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REPORTS

OF

515

CASES AT LAW AND IN EQUITY,

ARGUED AND DETERMINED

IN THE

SUPREME COURT OF ALABAMA,

DURING PART OF JUNE TERM, 1844, AND PART
OF JANUARY TERM, 1845.

BY THE JUDGES OF THE COURT.

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VOLUME VII.

NEW SERIES.

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REPORTS

OF

CASES ARGUED AND DETERMINED,

June Term, 1844.

BOYETT, ET AL. v. KERR.

1. The judgment of the Judge of the County Court upon the probate of a will, and his decree of final settlement of the estate under the will, cannot be joined in the same writ of error.
2. The judgment upon the probate of a will cannot be reviewed by a writ of error after the lapse of three years, between the judgment and the suing of the writ of error.
3. The proper course of practice in the County Court in testamentary causes is, for the person producing the will and asking probate to propound the will, to the Court in writing, with the usual facts necessary to be proved, and informing the Court what persons will be entitled to distribution if the will is invalid.
4. In order to make a valid decree for the final settlement of an estate, every party entitled to distribution must be brought in some way before the Court. When persons entitled to distribution under a will die, before a settlement, it is necessary that their personal representatives should be before the Court at the final decree.
5. *Quere*—Whether a statement by the testator, proved in a nuncupative will, that he wanted one sum of money appropriated to the schooling of three of his children, and another sum to the like purpose of two other children, is not to be considered as the creation of a trust, and not as a legacy. *Quere*—Also, whether these trusts or bequests do not lapse in the event of the death of the *cestui que trust.*

6. When the construction of a will depends upon extrinsic facts, a Court of error, in reviewing a decree of final settlement made under the will, will intend that the necessary facts were proved to sustain the decision, unless the contrary is shown by an exception.

Writ of error to the County Court of Sumter County.

On the 28th of October, 1839, Lock Boyett made application to the Judge of the County Court of Sumter, for probate of the last will and testament of Robert Boyett, deceased: whether this application was oral or written does not appear, but a paper is set out in the transcript in these terms:

"On Sunday, the 21st day of July, 1839, I was sent for by my brother, Robert Boyett, who was extremely low at the time with fever: after I arrived at my brother's house, my brother, about twelve o'clock, on Sunday, told me that he had a fine plantation there, and that if not attended to, he asked me, if it would not soon go to rack. I told him it would. He then told me he had made up his mind how he wanted his property disposed of. He said he wanted three thousand dollars appropriated to the schooling of his three youngest children, and fifteen hundred to his two children at Gainesville—that he wished all his property sold and equally divided; and that I could buy Sally (his wife) a place. My brother died about sundown, 23d July, 1839. He stated to me several times, between Sunday and his death, that he should not recover; and on the day of his death, in the morning, he stated to Samuel Swilley and myself that he ought to do something about his estate. Mr. Swilley said no—that he was doing well, and would be about again in a few days. Mr. Swilley thought it best not to say any thing to him about a written will. I thought he was better from Sunday evening till Tuesday morning, and on Tuesday stated to my brother that I must go home to see about some business—he said if I did go, I would never see him again. I then staid.

LOCK BOYETT."

26th July, 1839."

Attest:—Sam'l B. Boyd.

To this is appended an affidavit, sworn to by Lock Boyett, in open Court, on the 14th of December, 1839, in these words: Personally came Lock Boyett, in open Court, and being first

duly sworn, deposeth and saith, that Robert Boyett, now deceased, did speak the foregoing, as therein set forth and expressed, whilst of sound and disposing mind and memory, on the day and date therein enumerated.

On the application for probate it was ordered that the clerk should cite the widow of the deceased, and also Missouri, and Jackson Boyett, to appear at the next term of the Orphans' Court, on, &c., and that Price Williams be appointed guardian, *ad litem*, to represent Green, Amanda, Mary J., John and William, all minor heirs of the deceased. Citations accordingly were issued, and at the return day the parties cited appeared, and the proceedings were continued until the 7th day of December. It was also ordered that the clerk should issue a *venire facias* to summon a jury "to decide upon the legality of the nuncupative will desired to be established by Lock Boyett, as the same is (was) contested by Jackson Boyett, one of the heirs of said deceased."

On the 7th December, the record recites that the parties came by their attorneys, as well as a jury who were sworn "to speak the truth upon the issue," but a juror was withdrawn and no verdict rendered, and then the case was continued until the 14th of the same month.

The entry of the proceedings on the 14th of December, recites the coming of the parties, contesting an instrument purporting to be the nuncupative will of Robert Boyett, deceased, to wit, Lock Boyett, the brother of the deceased, and Jackson Boyett, son and heir of said deceased, by their attorneys, and also Price Williams, the guardian, *ad litem*, to the minor heirs of the deceased, to wit, Green, Amanda, Mary J., John and William Boyett, which instrument bears date 26th July, 1839, signed by Lock Boyett, and attested by Samuel B. Boyd. A jury was then empannelled and sworn to speak the truth upon the issue joined, who after hearing testimony, the argument of counsel, and the charge of the court, retired, made up, and reported the following verdict: "We, the jury, do find it the will and the wish of Mr. Boyett that his property should be disposed of as he told his brother." Whereupon it was ordered by the Court that said writing be probated as the nuncupative and last will and testament of Robert Boyett, deceased, and recorded. Sally Boyett, widow and relict of said deceased,

waived the provisions made for her in the will, and claims her dower under the laws of the State. She also relinquished her right to administer, and as well as Jackson Boyett, son of the deceased, agreed that Lock Boyett should be appointed administrator. The latter was therefore appointed administrator with the will annexed.

Lock Boyett afterwards died, having first made a will wherein he appointed John W. Kerr, his executor, and on the 16th day of October, 1840, Kerr was appointed administrator *de bonis non, cum testamento annexo,* of Robert Boyett, deceased.

Kerr stated his accounts for a final settlement, and due notice having been given, no objection was urged by any person interested. The Court then proceeded to distribute the assets of the estate, which appeared to be 19,057 45-100 dollars. From this was taken 2,750 dollars, which the administrator, by order of the Court, paid to the clerk, to be paid to Wm. J. Steele, guardian of Amanda, William and John Boyett, minor heirs of the deceased, in compliance with the will of the deceased, for tuition, &c.; which sum was by the said clerk paid over to the said Steele, and thus left a balance due from the administrator of 16,307 45-100 dollars. This sum was then distributed between the six heirs, making a dividend to each, of 2,717 90-100 dollars. These six heirs, as shown by other portions of the judgment entry are Jackson Boyett and Missouri Boyett, of full age, and Green, Amanda, William and John Boyett, minors; the first represented by Samuel Swilley, and the last by William J. Steele, as guardians. Payment having been made of the sum distributed to each heir, the administrator was discharged from his administration bond.

The writ of error is sued out in the names of all the distributees, and it is stated in the writ that Mary J. and Emily Boyett, two of the children of the decedent, Robert Boyett, have died since his death. Amanda, John, and William Boyett, three of the distributees, by their guardian, Wm. J. Steele, refuse to join in the assignments of error, and crave a severance, but consent that the writ may be prosecuted on behalf of the other distributees.

The errors assigned are:

1st. That it does not appear that the will was made at the

habitation of the deceased, or where he had resided for the space of ten days or more next preceeding the making of the will.

2d. That the property bequeathed being more than one hundred dollars, it was necessary to show that the testator called on the persons present, or some of them, to take notice that it was his will, and this no where appears.

3d. That the pretended will is altogether void and uncertain.

4th. That the probate of the will was decreed on the finding of a jury, when the verdict does not sustain the will, nor authorize the decree of the court.

5th. That by the final decree the estate is not equally distributed according to the provisions of the will, but the sum of 2,750 dollars before distribution, is decreed and paid to Amanda, William, and John Boyett, and only the residue is divided.

6th. That it does not appear whether the said Amanda, William and John were the three youngest children of the deceased, or whether these three include also the two at Gainesville, or whether some of each class are included, or one of either.

7th. That the distribution decreed is not according to the will.

8th. That it does not appear that distribution was decreed to those who are legatees under the will.

9th. That the decree is in other respects informal and insufficient.

10th. That the will is void for uncertainty.

Bliss and Baldwin for the plaintiffs in error, without waiving the assignments with respect to the probate, insisted that the only construction to be given to the terms of the will, is, that the testator intended his estate should be equally divided between all his children. The ambiguity is not explained by the context, and, unless there are two classes of children referred to, as entitled to more than the others, is *patent* and therefore not subject to explanation.

There is nothing in the will to indicate it was the testator's intention that the sums named, should be *appropriated* previous to distribution; but the context rather shows that he wished the sums applied to that specific purpose out of their respective shares. Again, the will may be considered as entirely

void on account of its vagueness and uncertainty. Those clauses are void and rejected where the words are so general and uncertain that the testator's meaning cannot be collected from them. [Lovelass on Wills, 282.]

METCALF and STEELE, contra.

GOLDTHWAITE, J.—In the present case an attempt is made by the assignment of errors to connect the judgment admitting the will to probate, with the subsequent decree for a final settlement. Our opinion is that this course cannot be be pursued, inasmuch as the probate is in itself a final judgment, entirely independent of, and distinct from the subsequent administration. In many cases the parties to contest the will would be entirely different from those interested in a distribution under it; and even where the persons are the same, yet the interests of some must necessarily be different under the will from what it would be, if it was out of the way. These reasons are conclusive to show the two decrees cannot be examined under the same writ of error.

2. It might in this case, where the legatees under the will are the same persons as would have been distributees of the estate, if there was an intestacy, perhaps be allowed to the parties to elect whether they will, under this writ of error, proceed to examine the errors which affect the probate, or those supposed to be connected with the final distribution; but if they were permitted to elect the former, the writ of error would necessarily be dismissed, because it is barred by the statute of limitations. The judgment for the probate was rendered on the 14th December, 1839, and the writ of error was sued out in May, 1843. Consequently more than three years had then elapsed from the time of the probate. A writ of error to reverse a judgment of the Circuit Court may be sued out at any time within three years after its rendition, and not afterwards. [Clay's Digest, 309, § 17.] Writs of error lie from any judgment or order final of the Judge of the County Court to the Circuit or Supreme Courts, in the same manner as upon judgments of the Circuit Court. [Clay's Digest, 297, § 4.] The effect of the last enactment is to bring writs of error from the County Courts within the bar of the statute first recited, and thus force the Court to examine into the errors of the probate, even if such was the election of the plaintiff in error.

3. We cannot but lament that the course of practice in our County Courts in testamentary causes is so exceedingly inartificial, as frequently to produce general inconvenience to the suitors themselves as well as embarrassing questions to appellate courts; and this record is certainly no exception to what seems to be the general rule. Here we have to grope through the whole case from beginning to end to ascertain who the parties were who should have been before the Court at the commencement of these proceedings. How much more simple and convenient, to say nothing of it as being the appropriate course, would it be for the person asking probate of a will to propound it in writing, with the facts necessary to be proved to make it valid; setting out the names, description and residence of those entitled to the estate as heirs or distributees, and praying that the whole may be admitted to probate. On such an application citations could be issued with certainty, when in its absence all is doubtful or dependent upon the extra-official information of the Court. But with this at present we have no other concern than to call the attention of practitioners and County Judges to the defective practice of these Courts, in the hope that the remarks may, to some extent, cure the evil which now exists.

4. The decree for final settlement is erroneous for the want of the necessary parties, and this is a defect which we are astonished to notice, independent of any assignment of error, because it shows a total absence of jurisdiction, in the Court to render any decree whatever. Every party entitled to distribution must necessarily be before the Court in some way before there can be a valid final settlement. It appears when the whole record is considered, that the testator, besides a widow, left eight children, all of whom, either by the will or by statute, were entitled to some portion of the estate. It may possibly be surmised the widow is dead, and it is stated in the writ of error that two of the children had died since the death of the testator. In the first proceedings had, the widow and seven children are named. It is immaterial when the widow, (if in truth she be dead,) or three children died. If the deaths happened after that of the testator, their personal representatives were necessary parties to the final settlement of the estate, inasmuch as they were severally entitled to portions

of it, which portions at their respective deaths, instead of lapsing into the general fund became the subject of distribution as parts of their several estates. The reasons for thus making the personal representatives of the widow and children parties to the proceedings will be obvious, when it is considered that it may be possible, that all the surviving children may not be thus related to the widow, and it may also be possible, that some of those who survive are not of the whole blood with one or both of those deceased; in either of which events a different sort of distribution would obtain from that which would be proper under the will; but the conclusive reason is, that the survivors have no interest under the will in the portions of those who are dead.

5. However doubtful we should feel that this is a valid nuncupative will under the statute, we are bound as an appellate Court so to consider it upon error; whether it could yet be questioned in a proceeding in equity, to set it aside, is a question not now to be examined. We should therefore, if it was necessary for the determination of the rights of the parties, proceed to give our views of the construction it ought to receive; but as this, from the condition of the case is unnecessary, we shall content ourselves with remarking, that it may be questionable whether the bequests which are supposed to be specific, are any thing more than mere trusts imposed on the conscience of the executor. It may likewise deserve consideration whether, if the children for whose benefit these trusts are created should die before the sums should be expended pursuant to the will, the unexpended surplus would not remain as a part of the estate. In this view too it may call for consideration, whether the County Court has any jurisdiction over the trust funds, as if they had such, there seems to be no jurisdiction in that Court to control them. With respect to the children who are entitled to the benefit of these clauses in the will, it is evident the construction depends upon extrinsic facts. 3,000 dollars are appropriated for the schooling of his three youngest children, and 1,500 dollars for his two children at Gainesville. If the children at Gainesville were not of his three youngest, but were older than three others, the knowledge of their circumstances would enable every one to give a satisfactory construction to that which without the information is

uncertain. But let it be supposed that two of his three youngest children were at Gainesville when the will was made, it cannot be doubted his intention was, that out of three, two should receive 750 dollars, and the other of the three 1,500 dollars. Without such a construction under such circumstances the whole clause would be incapable of any signification whatever. The extrinsic facts necessary to the construction of the will do not appear upon the record, but we should hesitate to reverse the decree if this was the only error complained of and ascertained, because it was competent for the parties by exception, to have set out what the facts were, if the proper construction was not given upon the will in connexion with them; and having failed to do so, we should incline to sustain the judgment, upon the presumption that the facts were such as to warrant it; and such would be the case, if the three younger children were at Gainesville and the other two elsewhere, and if one of each class were dead.

For the error we have noticed with respect to the parties, the judgment decreeing a final settlement, must be reversed and the cause remanded, that the parties may take such course as they shall be advised.

STILES v. LACY.

1. Duplicity in a replication to a plea is bad on general demurrer, notwithstanding the act abolishing special demurrers.

Error to the County Court of Marengo.

Assumpsit on promissory note.

The defendant pleaded, that subsequent to the making of the promises in the plaintiff's declaration, he obtained a certificate in bankruptcy from the District Court of the United States for New Hampshire. Accompanying the plea, is a certified copy of the proceedings in bankruptcy.

The plaintiff demurred to the plea, which being overruled, he replied, "That the certificate and discharge therein alledged, if granted at all, was fraudulently obtained by said Stiles—in this, that the said Stiles did not reside nor have his place of business in the State of New Hampshire, when said discharge and certificate were granted, at the time of filing his petition for said discharge, nor at any other time since, but that he then did and still does reside and do business in the State of Alabama. That the application for discharge was voluntary, and before applying for said discharge, and in contemplation of bankruptcy he made conveyances of a portion of his effects for the purpose of preferring some of his creditors over others. That the said Stiles did not render up all his property, rights and credits, as is required by law in such cases, but knowingly withheld more than said law allows, and, for not giving said Lacy notice of his application; and this," &c.

The defendant demurred to this replication and the Court overruled the demurrer. And thereupon, on issue joined, the jury found a verdict for the plaintiff, and the Court rendered judgment from which this writ is prosecuted. The defendant assigns for error the judgment of the Court on the demurrer.

STEWART, for plaintiff in error.
B. F. PORTER, contra.

ORMOND, J.—We do not think it proper to examine the merits of the question presented on the pleadings, as the replication to the plea is so defective that it cannot be sustained. It contains several distinct and unconnected matters of defence—that the Court in New Hampshire had not jurisdiction to render the decree, because the defendant was a citizen of Alabama—that the application was voluntary and fraudulent, and that the plaintiff had no notice of the intended application.

The statute authorizing several pleas extends only to pleas to the declaration, and does not embrace replications, rejoinders, or any of the subsequent pleadings. This was held by this Court in Gray v. White, 5 Ala. Rep. 490, as it regards several rejoinders to a replication. The replication in this case is precisely the same as if three distinct replications had

been formally made to the plea. If that could be tolerated, it would be in the power of the other party to make several rejoinders to each replication, and thus an infinity of issues would be presented.

Our statute allowing several pleas is in substance that of the 4 Anne, under which it has always been held that it does not extend to the pleadings subsequent to the pleas to the declaration. 5 Bac. Ab. Pleas 447, K. 3, Com. Dig. Pl. E. 2.

The duplicity of this replication is not protected by the statute abolishing special demurrers. Duplicity in a plea would not be reached by a special demurrer, because the party may plead more pleas than one, and therefore to embrace several distinct matters of defence in one plea, as it would in effect be pleading several pleas, is matter of form and not substance. But as but one replication can be made to a plea, duplicity is matter of substance and not form, which was all that the statute was intended to provide against.

Let the judgment be reversed and the cause remanded, that the plaintiff may, if he thinks proper, amend his replication.

KNAPP v. McBRIDE & NORMAN.

1. *Semble*—Where the defendant denies by plea, regularly pleaded, that he made the note on which the action is founded, the plaintiff may read the note to the jury, if he show *prima facie* that it was made by the defendant, or that he authorized it, or adopted it as his own; but in the inquiry before the Court, the examination should not be extended so far as to show, that in point of law, there is no obligation upon the defendant. When the note has been read to the jury upon the plaintiffs proof, then the defendant may adduce his evidence.
2. So where a note purports to have been made by an attorney, the written power, if unexceptionable in point of law, and shown by the plaintiff to be *prima facie* genuine, should be allowed to go to the jury, in an action upon the note.
3. D. & K. appointed H. D. their attorney, "with full power and authority for us, and in our name, to draw or indorse promissory notes, to accept, draw or indorse bills of exchange, and to sign any check, or checks, order or orders, for any money or effects, which we now have, or hereafter may have, deposited in the Branch of the Bank," &c.: *Held*—that H. D. had an authority to make, draw, or indorse notes or bills, on account of D. & K., without reference to the form

and amount, or place where, and to whom payable. As to checks and orders there is a limitation—these must be addressed to the Branch of the Bank, &c.

4. One partner may bind the firm by contracts relating to the partnership, and when a note made by one partner in the name of the firm is put in suit, it is not incumbent on the plaintiff in the first instance to show that the note was given for a partnership transaction, for such is the legal intendment. If the note was given for the individual debt of the partner making it, with the knowledge of the party to whom it was given, these facts must be shown in defence to the action.
5. *Semble*—Where a promissory note is made negotiable and payable at Bank, the right of set off or other kindred defence is waived, not only against the Bank, but against any one who may advance upon it, without notice of the unfairness of its origin.
6. The death of one of several partners, operates a dissolution of the partnership, unless its continuance is provided for by express stipulation. But, *quere*—where one partner gives a power of attorney in the firm name with authority to make notes, draw bills, &c., and after his death, the attorney without a knowledge thereof, makes a negotiable note in the name of the partnership, antedated of a day when the deceased partner was in life, which goes into the hands of a *bona fide* holder, without notice, may it not be enforced against the surviving partner, although it was given in payment of the deceased partner's debt?
7. Where the Court charged the jury, that a power of attorney, before them, conferred the authority to execute the note on which the suit was brought, unless the same was revoked, which they were to ascertain from the evidence before them, the charge is not objectionable, as referring to the jury the decision of the legal question, viz: what amounts to a revocation?
8. A party excepting to the ruling of the Court against him must show affirmatively the existence of error, and an appellate Court cannot aid him by presuming what the record does not discover.
9. The *neglect* or *omission* of the judge to instruct the jury on some material point, though it might sometimes furnish just grounds for a new trial, will not warrant a reversal of the judgment.

Writ of error to the County Court of Mobile.*

THIS was an action of Assumpsit, at the suit of the defendant in error, against the plaintiffs, on a promissory note, dated Mobile, 11th June, 1836, and subscribed thus, "Dunning & Knapp, per H. Dunning," by which they promised six months

* This case was determined in June, 1838, and should have been reported in 7th or 8th Porter, and though the opinion was written by myself, I had entirely forgotten it, until the copy of a certified copy of the original was handed me two days ago by the Clerk of the Supreme Court, with the remark that he had just obtained it in Mobile, and that the case was not reported. Neither the Clerk or late Reporter recollect any thing of the original; it is not found in the office of the former, though from having certified the copy, which he has been permitted to transcribe, he knows it was once there. The case is of such a character as deserves a place in our Reports, and we avail ourselves of the earliest opportunity to make it public. —COLLIER, C. J.

after date, "to pay Wm. D. Primrose, or order, five thousand dollars, for value received, negotiable and payable at the Branch of the Bank of the State of Alabama at Mobile." On this note were the indorsements of the payee and Messrs. Rivers & Hopkins.

The defendant pleaded—1. Non-assumpsit. 2. That neither himself, nor Dunning & Knapp, made, signed or executed the note declared on, in manner and form as the same is set forth in the declaration. This latter plea the defendant verified by affidavit. 3. The third plea is the same as the second, save only it adds, the note was not made, signed and executed by any person authorized by Dunning & Knapp, and they have not "duly and legally ratified the signing and execution thereof, as their act and deed." 4. That the defendant did not make, sign or execute the note, nor was it made, signed or executed by any person authorized by him individually, or as a member of the firm of Dunning & Knapp, or otherwise, neither hath he duly and legally ratified the signing and execution thereof subsequently as his act and deed. 5. That the note was not made, signed or executed by the defendant or any one authorized to bind him individually, or as a member of the firm of Dunning & Knapp, or otherwise. This latter plea was verified by the defendant's affidavit. The cause being submitted to a jury, a verdict was returned for the plaintiff, and judgment rendered accordingly.

On the trial the defendant excepted to the ruling of the Court. From the bill of exceptions, it appears, that to prove the execution of the note, the plaintiff introduced a witness, who testified, that he believed the signature of H. Dunning to the note was genuine, but stated that he had never seen him write, and only judged of his signature from checks drawn by him on the Branch Bank, and which the witness, as one of the paying tellers, had paid. Plaintiff then offered a power of attorney, which the same witness produced in Court, of the following tenor:

"Know all men by these presents, that we, Dunning & Knapp, of the City of Mobile, have nominated, constituted, and appointed, and by these presents, do nominate, constitute, and appoint Henry Dunning, of the same place, our true and lawful attorney, with full power and authority, for us, and in

our name, to draw or indorse promissory notes, to accept, draw or indorse bills of exchange, and to sign any check or checks, order or orders, for any money or effects, which we now have, or hereafter may have, deposited in the Branch of the Bank of the State of Alabama at Mobile; with power, also, as attorney or attorneys for the purposes aforesaid, to make and substitute. And we do hereby declare it to be our meaning and intention, and the true intent and meaning of these presents, that the power and authority hereby given to our said attorney, shall and may continue to be exercised by him, or his substitute, until the same shall be revoked by us in writing, and notice thereof to the Cashier, for the time being, of said Branch of the Bank of the State of Alabama at Mobile, given. And in case any act or acts, thing or things, which our said attorney, or his substitutes, are hereby authorized or empowered to do for us, shall be done by him, or them, after our death, but before notice of our death shall have been given to the Cashier for the Branch of the Bank of the State of Alabama at Mobile, the same shall be to all intents and purposes as valid, binding and effectual in the law, against our heirs, executors and administrators, as if the same act had been done by our said attorney, or his substitutes, in his life time, or by us in person: Hereby ratifying and confirming all that our said attorney or his substitutes shall lawfully do by virtue thereof. In testimony whereof, we have hereunto set our hands, the twenty-eighth day of May, in the year of our Lord, one thousand, eight hundred and thirty-five.

(Signed,) DUNNING & KNAPP."

This power of attorney is subscribed by E. C. Southworth, as a witness to the signature of Dunning & Knapp, and at the foot thereof, there is a certificate of a notary public of Mobile, under his notarial seal, dated the 29th of May, 1835, in which he certifies, that Dunning & Knapp, by Edward Dunning, appeared before him, "who acknowledged that he signed and sealed the foregoing power of attorney, on the day and year therein mentioned, to the said Henry Dunning, for the uses and purposes therein mentioned."

The witness first adduced, testified that the power, of which a copy is set out above, had been lodged in the Bank, in pursuance of a rule or custom of the institution, in all cases where

persons intended others to deal for them as agents, with the Bank, by Edward Dunning: *Further*—the power had been verbally revoked in Bank, by either Edward Dunning, or his partner, Knapp, on the 28th of June, 1836, and an entry of that revocation made on the same day, by the proper officer, in a book kept for that purpose; and that after that day it had not been regarded by the Bank as a subsisting power.

Henry Dunning was then called by the plaintiff, to give evidence *to the Court;* being sworn, he stated that he had executed the note in question, as the agent of Dunning & Knapp, supposing at the time, he was authorized to do so; that he had in one of the desks of Dunning & Knapp a power of attorney, (which however, was not produced, nor any effort made to produce it.) That he had never seen the power set out above until then, and only heard of its existence from Edward Dunning. Witness further proved that Edward Dunning and defendant composed the firm of Dunning & Knapp; that they kept a jeweler's store in Mobile, where the note bears date, and up to the death of Dunning, which occurred about the 4th of October, 1836. The note in question was antedated about four months, was made some time before Dunning's death, though at the time of making it, his death was not known in Mobile. *Further*—the note was executed in order to raise money to take up a note which had been executed in the name of Dunning & Knapp, to certain vendors of real estate, and which had been purchased by Edward Dunning and one Wm. D. Primrose, for their own account. The defendant had no interest in the real estate, and was absent from the State when the same was purchased, and had been for a long time before, and so continued until the note was made, and had no "information or interest respecting the execution of the note above copied, and which was executed to raise money to pay off the note given for real estate as aforesaid."

E. C. Southworth, on the part of the plaintiff, stated that he signed the said power of attorney as an attesting witness, and that the same was executed in his presence by either Edward Dunning or the defendant, but he believed it was by the former. "*Upon this testimony so offered to the Court as aforesaid*, the plaintiff offered to read to the jury as evidence

the power of attorney herein above copied as aforesaid, and which was deposited in the said Bank as aforesaid: also, to read in evidence to the jury the promissory note first above mentioned, and herein copied as aforesaid, without further proof. To which the defendant objected, but the objection was overruled, and the said power of attorney and note herein above last specified, were accordingly allowed to be read to the jury as evidence in the cause. And the Court charged the jury that although the said promissory note had not been sold to the said Branch Bank, and had not been discounted by, or at any time belonged to the Bank, yet the said power was sufficient evidence of authority in H. Dunning, to make the said note, unless it had been revoked, (a fact for the jury to ascertain from the evidence before them,) before the said note was executed." To all which the defendant by his counsel excepted, &c.

The errors are—"First, in admitting the evidence stated in the bill of exceptions. Second, in giving the charge as stated in the said bill of exceptions."

GAYLE & VANDEGRAAFF, for the plaintiff in error.*
J. A. CAMPBELL, for the defendants.

COLLIER, C. J.—We have considered this case very attentively and are satisfied, that several of the points made at the argument are not presented by the record. The questions assigned for error, arise upon the bill of exceptions, and are 1st. Was the power of attorney and the note on which the action is founded properly received in evidence? 2d. Is the charge of the Judge to the jury erroneous, *as stated in the bill of exceptions?*

1. Where a defendant by plea, regularly pleaded, denies that he made a promissory note the foundation of an action, it is incumbent on the plaintiff before he can read the note to the jury, to show *prima facie* that it was made by the defendant,

* We have not been able to find a brief or note of the argument, but infer from the opinion, that other points than those raised upon the bill of exceptions were made at the bar. The latitude taken by counsel will readily furnish the reason why the Court has even noticed points not legitimately presented by the bill of exceptions. This is frequently done in all appellate Courts in deference to the bar. The names of the counsel who appeared in the Supreme Court, it is supposed are correctly stated, as they are taken from the assignment and joinder in error.

or that he authorized it, or adopted it as his own. When the plaintiff does this, he throws upon the defendant the burthen of making good his defence.* In the preliminary inquiry before the Court, it would be irregular to extend the examination so far as to show that *in point of law*, there is no obligation upon the defendant, if the plaintiff has first proved that *in fact* the note was made by him or one having authority from him; after the paper has been read to the jury, upon proof making out a *prima facie* case for the plaintiff, then the defendant's proof is to be heard—the plea addresses itself to the jury, and it would not of course be permissible to contest the facts before the Court. In the case before us it was proved that the deceased partner, made a power of attorney subscribed in the name and style of the firm, with the usual attestation and seal, and deposited it in the Branch of the Bank of the State of Alabama at Mobile, by which H. Dunning was authorized to draw or indorse promissory notes, &c. for and in the name of Dunning & Knapp.

It was then shown that the attorney named in the power made the note in question. In Lucas v. The Bank of Darien, [2 Stewart, R. 320.] it was decided that "The right of one partner to appoint an agent to conduct the business of the concern results unquestionably from the genuine authority of partners," and that the use of a seal by one partner in giving an authority to make promissory notes in the name of the firm, did not invalidate a note made by the agent—that the seal affixed to the power, did not in any degree enhance the dignity of the note as a security for money, but should be treated as an unessential part of the power. Taking the letter of attorney to have been unexceptionable *in point of law*, and the note to have been made by the attorney it designates, we can conceive of no objection to the admission of the note and power in evidence to the jury.

2. It was not essential to the validity of the note, that it should have been negotiated at the Branch Bank in order to have made it binding on the plaintiff. The power does not

* The conclusion upon this point conforms to what seemed to be the practice in this State at the time the case was decided, and previously, but according to later decisions, the note is admissible without first making out a *prima facie* case, by parol proof to the Court, and the evidence is adduced to the jury to show its genuineness, or that it imposes a legal duty.

restrict the attorney to the making of notes to be sold or discounted there. It invests Henry Dunning "with full power and authority for us (Dunning & Knapp) and in our names to draw or indorse promissory notes, to accept, draw, or indorse bills of exchange, and to sign any check or checks, order or orders, for any money or effects which we now have, or hereafter may have, deposited in the Branch of the Bank of the State of Alabama at Mobile," &c. Here is a clear authority to make or indorse *notes* or *bills* on account of the firm, without any direction as to form and amount, or place where, and to whom payable. The limitation extends only to checks or orders—these must be addressed to the Branch Bank. So that if Dunning & Knapp had money or other valuables deposited in any other Bank, or elsewhere, they could not have been withdrawn by their attorney.

It may be laid down generally, that one partner has the right to bind the firm by contracts relating to the partnership. [Collyer on Part. 212.] And if one partner give a promissory note in the name of the firm, it would according to the law merchant be binding on the firm *jointly* in the hands of any *bona fide holder.* [Collyer on Part. 219,] So in Church vs. Sparrow, [5 Wend. R. 223] it was decided that where a general partnership exists, and money is borrowed by one of the firm in the name of the concern, all parties are liable, although the money obtained be appropriated by the partner borrowing it to his own use. And notwithstanding our statute of 1812, in regard to the assignability of bonds, &c., it is clear, that if there is no fraud in the concoction of a promissory note, on the part of the party *in whose favor* it is made, (or his agent,) it would be a valid security against the partnership. [Collyer on Part. 240, et. post.; Alk. Dig. § 6, page 328]

If one partner give a security in the name of the firm for a debt, known to the person taking the security to be his individual debt, if done without the consent of his copartners it is not binding upon them. [Livingston vs. Hastie, 2 Caine's R. 246; Livingston vs. Roosevelt, 4 Johns. R. 262; n. Lansing vs. Gaird, 2 Johns. R. 300; Hagas, et. al. vs. Mounts, 3 Blackf. R. 57; Taylor, et. al. vs. Hillyer, 3 Blackf. R. 433.] Nor can one partner bind his copartner without his assent by

subscribing or indorsing a promissory note with the partnership name as security for the debt of a third person with the knowledge of the creditor. [Rolston vs. Click, et. al. 1 Stewart R. 526; Laverty v. Burr, 1 Wend. R. 529.]

And where a note made by one partner in the name of the firm is put in suit, it is not incumbent on the plaintiff in the first instance to show that the note was given for a partnership transaction. It will be intended to have been made in the course of partnership dealings; and if it was given for the individual debt of the partner making it, with the knowledge of the party to whom it was given, these facts must be shown in the defence by the party taking advantage of them. [Doty vs. Bates, 11 Johns. R. 544; Vallett vs. Parker, 6 Wend, R. 615.]

The principles we have stated in regard to the power of individual partners are either essential to the credit of the firm or to commercial prosperity, or else result from the settled rule, that whenever one of two innocent persons must suffer by the acts of a third, he who has enabled such third person to occasion the loss, must himself sustain it. [Collyer on Part. 241; 2 T. R. 70; 6 Wend. R. 620.]

From the record it appears, "that the said note was executed in order to raise money to take up a note which had been executed in the name of Dunning & Knapp to certain vendors of certain real estate, and which said real estate had been purchased by Edward Dunning and one William D. Primrose for their own account." William D. Primrose is made the payee of the note, and if he be the same who was concerned with Edward Dunning in the purchase of real estate he must have been aware that the consideration of the note did not go to the account and benefit of the plaintiff. Yet conceding all this, and the plaintiff in error cannot insist upon a fraud on his rights as against the defendants. The note is "negotiable and payable at the Branch of the Bank of the State of Alabama at Mobile," and to some extent is governed by the rules of the law merchant. [Aik. Dig. § 11, page 329.] Apart however from this consideration, the note is *prima facie* binding on its apparent makers, and by being expressly made *negotiable and payable at the Branch Bank*, the right of set off or other kindred defence must be taken to have been waived, not only

as against the Bank, but against any one who might advance on the note without a knowledge of the unfairness of its origin. [Mandeville vs. Union Bank of Georgetown; 9 Cranch's R. 11, &c.]

To defeat a recovery on the ground that the proceeds of the note were applied to the benefit of Edward Dunning *alone*, and not to Dunning & Knapp, the plaintiff should have traced a knowledge of that fact to the defendants. So far from this having been done, the record does not discover even an effort to fix upon the defendants any participation in the fraud practised upon the plaintiff.

There can be no doubt but that the death of either party, however numerous the association, operates a dissolution of the partnership, unless such an event is provided for by an express stipulation to the contrary. [3 Kent's Com. 39; Collyer on Part., 60, 62, 113; Gow. on Part. 240; Cranshaw vs. Collins, 15 Ves. R. 228; Gillespie vs. Hamilton, 3 Madd. 251.] So the death of a party *in general* revokes all authorities given by him, whether expressed or implied. Yet in Usher & another vs. Dauncey & another, (4 Camp. R. 97,) it appeared that a member of a partnership, consisting of several individuals, drew a bill of exchange in blank in the partnership name, and delivered it to a clerk to be filled up for the use of the partnership as the exigencies of business might require, according to a course of dealing in other instances, and after the death of the partner who drew and indorsed the bill, and the surviving partners had assumed a new firm, the clerk filled up the bill, inserting a date prior to his death, and sent it into circulation; it was held that the surviving partners were liable as drawers of the bill to a *bona fide* holder for value, although no part of the value came to their hands.

Lord Ellenborough said that the case came within the principle of Russell vs. Langstaff, (Doug. R. 513,) that the power must be considered to emanate from the partnership—not from the individual partner, and that therefore after his death, the bill might still be filled up so as to bind the survivors.

The case at bar strikingly resembles that cited from 4th Campbell—in that case the note had no legal existence until it was negotiated after the death of the partner. Its delivery to

the clerk with power to negotiate it, did not convey an authority higher or more conclusive than did the power in the present case. In the former case, so in this, the partner giving the power had died before it was executed; in both, the notes were antedated, and a collection sought of the surviving partners who had had no direct agency in the transaction, and derived no benefit from it. The instructions to the jury state the law as follows: "That although the said promissory note had not been sold to the said Branch Bank, and had not been discounted by, or at any time belonged to the Bank, yet the said power was sufficient evidence of authority in H. Dunning to make the said note unless it had been revoked, (a fact for the jury to ascertain from the evidence before them,) before the said note was executed." The Judge did not refer to the jury the *question of law*, whether upon the facts the authority was revoked—they were merely to inquire if the evidence establish the fact of a revocation.

The bill of exceptions does not inform us what were the instructions on this point, and we might, therefore, in obedience to a rule recognized in all appellate Courts, to intend every thing consistent with the record, in favor of the judgments of subordinate jurisdictions, infer either that the Judge gave no instructions on the point, or that he gave such as conformed to the law.

It has been decided by this Court, that the party excepting is required to show affirmatively the existence of the error of which he complains, and that the Court cannot aid him by making presumptions beyond what the record discovers.—[Johnson vs. Ballew, 2 Porter's R. 29; to same effect, Richardson vs. Dennison, 1 Aik. R. 210.] In Adams vs. Ellis, (1 Aik. R. 24) it was held, that if a bill of exceptions be so drawn up that it cannot be learned from the record, whether error had intervened or not, though there was some reason to believe that it probably had, under such circumstances the Court was bound to affirm the judgment. [See Eaton vs. Houghton, 1 Aikin R. 380.]

There can be no question but a party has the right to require the opinion of the Court upon any point of law that is pertinent to the issue, and the refusal of the Court to give such opinion would be available on error. *But the mere neglect*

or omission of the Judge to instruct the jury on some material point, though it might sometimes furnish just ground for a new trial, will not warrant a reversal of the judgment. [Smith, et. al. vs. Carrington, et. al. 4 Cranch R. 71; Church' vs. Hubbard 2 Cranch's R. 239, and Aik. Ala. Dig. § 5, 254.]

It is the conclusion of the Court that the bill of exceptions does not discover any error in the charge of the Judge to the jury.

The judgment is consequently affirmed.

GRAY v. TURNER, USE OF JOHNSON.

When the person for whose use a suit is instituted dies pending the suit, it is not necessary that his personal representatives should be made parties, but the suit proceeds in the name of the nominal plaintiff.

Writ of error to the Circuit Court of Russell County.

ASSUMPSIT in the County Court by Turner, who sues for the use of Johnson, against Gray, as the maker of a promissory note. At a term subsequent to the filing of the declaration, the defendant suggested the death of Johnson, for whose use the suit was brought, and prayed that no proceedings should be had until his personal representatives were made parties. The plaintiff's attorney conceded the death of the *cestui que use*, but declined to make his representatives parties. The Court therefore decided that the suit abate, and rendered judgment that the defendant go hence without day. A writ of error was prosecuted by the plaintiff to the Circuit Court, when this matter was assigned as error. The Circuit Court reversed the judgment of the County Court, and remanded the cause. Gray now prosecutes this writ of error, and assigns that the Circuit Court erred in reversing the judgment of the County Court.

HARRIS for plaintiff in error, insisted that the *cestui que use* was in fact the real party to the suit, as by the nominal party's admission, the equitable interest is not in him. Suppose an off set insisted on against the one for whose use the suit is brought, how can the nominal party litigate that matter? Besides the statute, [Clay's Digest, 316, § 22] allows costs against that party, and impliedly takes away the right for costs against the nominal plaintiff.

HEYDENFELDT, contra, cited Clay's Digest, 312, § 3.

GOLDTHWAITE, J.—Although the individual for whose use a suit is instituted is, to some extent, regarded by our statutes as the actual plaintiff, yet we do not think he is so for every purpose. In the case of Brown vs. Foster, 4 Ala. Rep. 282, after referring to the statutes which bear upon this practice of suing for the use of another, we say that we are not aware of any decisions here or elsewhere, which gives such a suit any other effect against the defendant than to exclude evidence of admissions made by the nominal plaintiff pending the suit. On principle this admission of interest in another seems to stand on the same footing as any other, except that it affords evidence that the defendant is advised of the transfer of the interest in the suit. The County Court seems to have proceeded upon the ground that the beneficial interest in the suit was actually transferred to the person for whose use it was brought; but conceding this to be the effect, it will not follow that his personal representatives, in the event of his death, must be made parties before it can properly proceed. It is insisted that this consequence results from the statute which allows costs to be given against the person for whose use the suit is brought. [Clay's Digest, 366, § 22.] This does not however, make it obligatory upon the defendant so to enter his judgment, but only permits him to do so if he deems it expedient. The previous statute which allows the suit to proceed, notwithstanding the death of the nominal plaintiff, [ib. 313, § 3,] is of the same nature, and was intended to give a right which did not previously exist. The object in both enactments seem to be, to relieve this convenient practice from the difficulties which existed, growing out of the circumstance, that the legal and beneficial interests is disjoined.

In the present condition of this suit the defendant cannot be debarred from any right which he might have, if the beneficial plaintiff was yet alive, except that the election is taken away, to have costs rendered against his personal representatives, in the event of gaining the suit.

Judgment affirmed.

CARLETON & CO. v. BANKS.

1. An act of the Legislature authorizing a married woman to act and dispose of all property subsequently acquired by her, by her own exertions, or from other persons, as a *feme sole*, with a saving as to existing creditors, will not have a retrospective effect, so as to deprive the husband or his creditors of the benefit of any property which previously belonged to the wife.
2. Previous to marriage a deed was executed conveying to a trustee a slave, and securing to the female a life interest therein, with remainder to others. The trustee delivered the slave to the female, who either before or after such delivery married. *Held*—that the life estate was subject to sale, under execution, by the creditors of the husband, notwithstanding the act previously cited; and that it was unimportant whether the possession was delivered before or after the passage of this act.
3. Whether the sale would affect the right of survivorship, *quere?*

Error to the Circuit Court of Tuscaloosa County.

The plaintiffs in error having obtained a judgment against Francis Hatfield and others, sued out their execution and levied it on a slave as the property of Hatfield, which was claimed by the defendant in error as trustee, and the proceedings in the Court below were had to try the right of property. The claimant relied on a deed made on the 4th May, 1832, between William Dunlap of the first part, Willis Banks (the claimant) of the second part, and Harriet Smith of the third. The deed conveys two slaves to the party of the second part, upon the trust that "he will permit the party of the third part to have and retain possession of the slaves and their increase, and to receive and enjoy the profits thereof, for and during the

term of her natural life, and at her death, said negro girls, with their increase, to descend to the issue of her body; and in the event that she dies without issue, then said negro girls and their increase, to descend to Nancy Smith, mother of said Harriet, and to the children of said Nancy." The deed contains a covenant that the trustee will convey to those in remainder, on the death of the party of the second part without issue. The complainant also read to the jury an act for the relief of Harriet Hatfield, passed 14th December, 1841, and proved that Harriet Smith, named in the deed, married Francis Hatfield, and that the slave levied on is one of the slaves mentioned in the deed.

It was proved that the slave was in the possession of Hatfield and wife, at the time of the levy, and for some time before, but the proof was not clear or conclusive as to the time when it went into their possession.

The Court charged the jury, that if the slave went into the possession of Harriet before the passage of the act for her relief, and was so in possession after her intermarriage with Hatfield, then the interests of Hatfield in the slave was liable to the execution. But, that if the slave was not in their possession until after the passage of the act, then the possession would be her possession, and not subject to the execution against Hatfield. To the last charge the plaintiff excepted, and asked the Court to charge the jury that in the absence of proof the presumption from the deed would be that the *cestui que use* went into possession under the deed, which the Court refused, and the plaintiff excepted.

The assignment of error brings to view the propriety of the charge given, and that refused.

CRABB, for plaintiff in error.

PECK & CLARKE, contra.

ORMOND, J.—The act of the Legislature passed for the benefit of Mrs. Hatfield is to the following effect: "That from and after the passage of this act, it shall be lawful for Harriet Hatfield, of the county of Marengo, to take, receive and hold by purchase, gift or inheritance, any property, either real or personal, free from the hindrance, molestation, control or au-

thority of her husband, Francis Hatfield, and the same to dispose of by will, gift or sale, in the same manner as if she were a *feme sole: Provided,* the provisions of this act shall apply only to such property as she shall acquire by her own exertions, or from other persons, and shall not operate to the prejudice of existing creditors, as to property heretofore acquired."

It is very certain that it was not intended by the Legislature that this act should have a retrospective operation, it cannot therefore have any effect upon any right of the husband or his creditors, which existed anterior to this act. The right, whatever its character may be, which was conveyed by the deed to Mrs. Hatfield, existed many years previous to the passage of the act, and was by the marriage, and subsequent reduction into possession, vested in the husband; the Court, therefore, erred in supposing that if possession of the slaves have not been taken by the husband and wife, until after the passage of the act, it would not enure to the benefit of the husband. The possession when taken, must be referred to the authority under which it was taken, and as that existed long anterior to the passage of this act, it is not affected by it. The question whether the slaves came to the possession of the husband and wife before or after the passage of the act was unimportant; and it is not necessary to consider the propriety of the refusal of the Court to charge upon the presumption of possession, insisted on by the plaintiff. It is, however, contended, that conceding that the Court erred in its charge to the jury, yet as the right of the wife was a mere equitable interest, it was not the subject of sale by execution at law, and could only be reached by the creditor on application to a Court of Chancery.

Marriage is, in law, a gift to the husband of all the personal property of the wife, in which she has an actual or beneficial interest. If in possession, it vests immediately upon the marriage. If it be a *chose in action,* it must be reduced to the possession of the husband during the coverture, or it will survive to the wife on the death of the husband. If the interest of the wife be equitable in its nature, and to reduce it into possession, it is necessary to resort to a Court of Chancery, that Court will refuse its aid, unless the husband makes a suitable provision for her out of the fund sought to be recovered. [Bond

v. Simmons, 3 Atkins, 20; Langhorne v. Nanny, 3 Vesey 469; see the general doctrine, 2 Story's Eq. 634, § 1406, and Roper on Husband and Wife, 256.]

In England, the wife's personal *chose in action* consists, usually, of either money in the hands of another, or stocks, and in such cases it is perfectly clear, that the husband, after having reduced it into possession, acquires full dominion over it. The estate of the wife in this case, being the *usufruct* of the slaves during her life, is supposed in argument to present a different case. In our opinion there is no difference whatever between them as to the question now before the Court. If the wife's *chose in action* is money in the hands of a trustee: as for example, a legacy; or, if it be a security for the payment of an annual sum, as an annuity, or a certificate of stock or Bank shares; in either case, upon a reduction into possession, the husband is invested with full dominion over it; because his title to it is the same as would be that of his wife in possession, if she had remained sole. In this case it is true the interest of the wife in the slaves is for life only, but that interest is as absolute and unqualified, as if it were for the life of the slave. Her right to the possession and services of the slave is subject to no contingency, nor to the control of any other person. The trustee in whom the legal title is vested for the purpose of the remainder, has no more right to disturb her possession than a stranger. If he had refused to deliver the possession according to the stipulations of the deed, he could by suit, either by the wife before marriage, or by the husband afterwards, have been compelled to deliver it, after which he would be *estopped* by his own deed, from asserting any right to, or disturbance of the possession.

The case of a leasehold estate belonging to the wife, appears to furnish the closest analogy to this of any we can find in the English books, and it appears to be settled, that the husband may assign it, and that whether the estate be legal or equitable, the assignee will take it discharged from the equity of the wife. [Bates v. Dandy, 2 Atkins 207; Druce v. Dennison, 6 Vesey, 385; Shannon v. Bradstreet, 2 S. & Lefroy, 52; 2 Story Com. on Eq. 636, § 1410.

Again, it appears there is a difference between an absolute equitable interest in the wife, and an interest for life only.

Thus, in Stanton v. Hale, 2 Russ. & M. 175, it was held, that a married woman could not, as against the assignee of the husband, claim a settlement out of an annuity for life bequeathed to her, the husband having afterwards become insolvent. The same doctrine was asserted in Elliott v. Cordell, 5 Madd. 149.

It must be kept in mind that the principle we have been considering is applicable only, when the husband or his assignee are endeavoring, by the aid of a Court of Chancery, to get possession of an equitable *chose in action* of the wife. If it be *legal* in its nature, so that the husband or his assignee is not compelled to seek the aid of Chancery to obtain the possession, the equity of the wife to a settlement does not arise. Indeed the equity of the wife has no existence, but in the power of the Chancellor to refuse his aid, unless a provision is made for the wife. In this case, however, the trustee yielded the possession, and it is therefore entirely unimportant whether the interest thus reduced into possession, was legal or equitable; in either case, after such reduction by the husband into possession, it becomes his property to the full extent of the interests of his wife.

It is very clear that the effect, as it respects the husband's right to the thing, must be the same, whether he obtains possession of it by suit, or by the voluntary delivery of the person in possession. If in the case of an equitable *chose in action*, the trustee chooses, without suit, to put the husband in possession, the equity of the wife to a settlement would be gone. In Murray v. Lord Ellibank, 10 Vesey, 89, Lord Eldon, speaking of an equitable *chose in action*, says, "The husband where he can, is entitled to lay hold of his wife's property, and this Court will not interfere. Previously to a bill filed, a trustee who has the wife's property, real or personal, may pay the rents and profits, and may hand over the personal estate to the husband." It is therefore, perfectly clear, that by this reduction into possession, in this case, the husband acquired all the interest which his wife had in the slaves, and it is entirely unimportant whether they came to the possession of the wife before marriage, or were reduced to possession by the husband afterwards. What is this interest? It is an estate for the life of the wife, in the slaves in controversy. This

is a chattel; it is a certain definite, tangible thing; is susceptible of transfer and sale, and may therefore be levied on and sold by execution. How does this differ from any other similar interest of the wife? Suppose a woman at her marriage to be the heir of a slave for an unexpired time, it cannot be questioned that such an interest would vest in the husband, and might be sold by execution for the payment of his debts; notwithstanding the legal title was outstanding in another. If Mrs. Hatfield had remained *sole*, can it be questioned that she could have sold her life interest, or that it would be liable for the payment of her debts? Yet the interest of the husband in possession, is precisely the interest which the wife had before marriage. Whether a voluntary sale by the husband, or a sale made under execution by his creditors, would affect the wife's right of survivorship, should she outlive her husband, is a question we are not called on to determine; it is certain it could not affect the interest of those in remainder.

The result of our examination is, that this was such an interest as was the subject of sale by execution, if reduced to possession by the husband, and the Court erred in supposing that the act of 14th December, 1841, was intended to affect the right of the husband to the interest of the wife in the slaves in controversy.

Let the judgment be reversed and the cause remanded.

GOLDTHWAITE, J.—I dissent from the opinion delivered by Judge ORMOND, because I think this a very clear case for Mr. Banks on the question of title.

It seems to me, whatever may be the equities of Mrs. and Mr. H. under the deed of trust executed by Mrs. Smith, that Banks was thereby invested with the legal title to the slave in controversy, and that it must remain in him until the complete execution of the trust, unless he is removed by competent authority.

But it is said, the possession of the slave by H. after marriage, constitutes a legal title, which is subject to execution, the more especially, as the trust, or use, will be considered as executed, so far as the life estate of Mrs. H. is concerned, by the delivery of it to her or her husband pursuant to the deed. This argument demands consideration, for upon it, as it seems to me, the decision of the Court is based.

I concede that the possession of a chattel invests the possessor with a legal title, which *prima facie* is subject to execution. It is on this idea that our decisions rest, that the estate of the mortgagor, &c, in chattels, may be seized and sold, when he remains in possession previous to the law day; but this concession will not warrant the conclusion that the sheriff can hold the chattel against one who is invested with, or has a better legal title. Even with respect to mortgages and deeds of trust, we have held that where the levy was before the law day, and a demand of the sheriff was made after it, that he was liable to the mortgagor or trustee for a conversion. [Magee v. Carpenter, 4, Ala. Rep. 469.] This, I believe, is not controverted, and therefore the right of the execution creditor of H. must rest on the supposition, either that Banks never had the legal title, or, if he had, that it was *ipso facto* extinguished for the lifetime of Mrs. H., so soon as she was permitted to have the use of the slave; a permission which Banks was bound to accord, and which a Court of equity would have compelled. In Lewis v. Adams, 6 Leigh. 320, a father executed a deed, conveying slaves to a third person "in trust for his daughter and all her children." The slaves were delivered into the husband's possession, and afterwards levied on by a creditor. The objection was taken that this was not a trust estate, inasmuch as the trustee had no duties to perform; but the Court held otherwise. In Virginia, I infer from one reference made by Judge Tucker, in the case of Roane v. Archer, 4 Leigh. 550, 568, there is a statute which allows the sale, under execution, of trust estates in possession of the *cestuis que trust;* yet there it was determined that the trustee might sue the sheriff who had sold slaves conveyed to the wife and husband during their joint lives, and the remainder to their children. These cases, in my judgment, prove clearly that the legal title to the slave in controversy was in Banks by the execution of the deed; and also, that his title was in no way affected by allowing Hatfield and wife to have the possession. I may also add, that it is laid down by elementary writers, that a use may be created of a chattel as well of lands. [Lewin on Trusts, 4.] And further, that if this deed is to be construed as passing the title directly from Mrs. Smith to her daughter, it, by the common law rule, would invest the

whole title, as by that no estate in remainder, of a personal chattel, can be created by deed. [3 Black Comm., 398.] It is equity which allows a remainder, either contingent or vested, to be made by a conveyance in trust. [Hargraves note, 5 Coke Litt. 20 a. 3 vol. note, 120.] Unless the legal estate remains in Banks he cannot, after the determination of the life estate of Mrs. H. place the slave in the possession of the person entitled to the remainder, without a trespass upon the rights of some one having the legal title. These reasons and decisions are perfectly satisfactory to my mind that Banks has the legal title to the slave; and, if this is true, I presume it will not be disputed that he may sue at law any one who intermeddles with it; and that a Court of law cannot for any purpose whatever, recognize the title of the *cestui que trust.* [Lewin on trusts, 20.]

The fact that the legal title is in Banks, would of itself be sufficient, in my opinion, to save the judgment from reversal; but as this point merely settles that the creditor cannot pursue the life interest of Mrs. H. at law, I am willing to concede it is of little value if the creditor has the right to subject her interest to the payment of this debt in any form; if he is entitled to sell her life estate without any qualification, it is of little importance whether he does it under execution at law, or by direction of a Court of equity. Indeed, in all cases, the leaning of my mind is to get at the result, when it is to be the same in either Court, as speedily and as cheaply as possible.

But I think there is no case, in which a creditor can at law pursue the equitable estate of the wife for the satisfaction of a debt due from her husband. It has been held by very high authority that a creditor, as such, cannot go into equity to subject either the *choses in action*, or equitable estate of the wife. [Gallego v. Gallego, 2 Brock. 285.] Waiving the distinction between a creditor, as such, or the assignee under a decree of bankruptcy or insolvency, and considering both to have the same rights, I shall consider what are the rights of the wife with respect to an estate held for her use by the intervention of a trustee; and I also lay out of view the value of property, inasmuch as I presume there is no such rule recognized in this country, as obtains in the English Equity Courts, where two

hundred pounds is said to be the minimum of jurisdiction. [Foder v. Finney, 4 Russ. 428.].

By the common law, marriage is a gift by the wife of all the personal chattels which she has in possession, and of all the choses in action to which she is entitled, if the husband shall reduce them to possession during the coverture. In relation to equitable estates, as the common law knew nothing about them, it was silent; and Courts of equity, looking beyond the mere arbitrary rule to its reason, have, by a gradual course of decision, built up a system to govern the equitable estates belonging to married women, which is termed the wife's equity. Some eminent jurists have thought it not easy to ascertain the precise origin of this right of the wife, or the precise grounds on which it was first established. [Murray v. Elibank, 10 Vesey, 90; 13 Ib. 6; 2 Story's Eq. 635, § 1407.] But others, with more propriety, in my opinion, refer the jurisdiction to the reason which induced the common law to give the husband the wife's property. [Elliott v. Cordell, 5 Madd. 155.] This reason is, that the husband is bound to support and maintain his wife, therefore as long as he does so, a Court of Equity will allow him to receive the income of his wife's equitable estate. [2 Story Eq. 642, § 1415.] But, in general, he will not be permitted to receive the principal, nor to assign it to a purchaser, even for a valuable consideration; nor will his assignee in bankruptcy or insolvency, take it discharged from the wife's equity. He, and any one claiming under him, will be compelled to make an adequate settlement upon the wife and her children before receiving the principal sum. [2 Story on Eq. 639, and cases there cited, 641, § 1412, 1414; Kenny v. Udall, 5 John. Ch. 473, S. C. 3 Cow. 590; Elliott & Wife v. Waring, 5 Mon. 340; Bennett & Wife v. Dillingham, 2 Dana, 437.] So far is the future maintenance of the wife looked to in England, that there the husband will neither be permitted to sell his wife's reversionary interest in an equitable estate, although she join in the sale. [Purdew v. Jackson, 1 Russ. 1; Horner v. Morton; 3 Ib. 65.] Nor will the Court permit it to be conveyed to the husband absolutely, though she join in the petition. [Stiffe v. Everett, 1 Mylne, &c. 37.] The wife's equitable estate in a term of years, is an exception to this rule, created by the House of Lords, against the opinion of the Chancellor.

[Sir Edward Turner's case, 2 Vern. 7.] But then, and since, disapproved, though followed. [Tudor v. Smayne, 2 Vern. Rep. 270.] Another apparent exception, that the husband *when solvent and maintaining his wife* may sell, *bona fide*, his wife's equitable estate for life, is settled by the cases of Elliott v. Cordell, 5 Madd. 155, and Stanton v. Hall, 2 Russ. & M. 175—though even in these it is distinctly admitted that if the husband was bankrupt or insolvent the wife's equity would attach to the general assignee. In Virginia, it has been directly determined that a creditor could not pursue slaves settled by deed of trust on the wife and husband for their joint uses, with remainder to their children. [Roane v. Archer, 4 Leigh. 550; Scott v. Gibson, 5 Munf. 569.] The effect of the cases of Elliott v. Cordell and Stanton v. Hall, in my judgment, is greatly misapprehended, if they are supposed to sustain the opinion of the Court; for they establish nothing farther than that the wife, whose equitable estate in personal chattels has been sold by her husband, at a time when he was solvent and maintaining her, has no equity during the life of her husband against the purchaser. That they do not touch or impair the general rule, or even the wife's right of survivorship, is evident, from the more recent case of Stiffe v. Everett, 1 Mylne, &c. There the wife joined her husband in a petition to have her life interest in some funds transferred absolutely to him; but the Master of the Rolls (see C. C. Pepey's) denied the application, and said, he doubted the right of the husband, even with the wife's consent, to dispose of her entire life estate, inasmuch as she might outlive her husband; in which event that part of the estate to be enjoyed after his death would be reversionary only. The same individual afterwards, when Lord Chancellor, reheard the cause, when he said no cases had been produced to support the petition, and he believed it certain that none could be found, as such a notion was in direct opposition to the decisions in Perdew v. Jackson and Horner v. Morton, 1 Russ. 1; 3 Ib. 65. This determination certainly never would have been made, if it then had been supposed, the husband was entitled absolutely to sell his wife's reversionary interest in her equitable life estate. Chancellor Kent has carried the idea of the wife's equity so far as enjoin a creditor from selling the husband's estate by curtesy in lands

of his wife, when she had been abandoned by him. [Haviland v. Bloom, 6 John. C. 117.] It is true, in this case there was a divorce a *mensa et thora*, but, he says, the wife's equity, independent of that circumstance, would warrant the relief.

I am not prepared to say how far the wife's equity ought to be sustained here; but certainly it must be conceded that under peculiar circumstances she has it not only against her husband, but against any one claiming under him. This right of the wife is incapable of examination or of adjustment in a court of law; and therefore, a creditor seeking to charge the equitable estate of the wife, in my opinion, must resort to a Court of equity. My judgment also leads me to the conclusion, that neither Hatfield or his wife have any legal estate in the slave in controversy, which can be successfully used by his creditor, to defeat the claim of the trustee, under the deed of Mrs. Smith.

CARLISLE v. DAVIS.

1. Where a cause has been tried upon an issue of fact, and verdict judgment thereupon, it will be intended on error, that a demurrer to the declaration, found in the record, which does not appear to have disposed of, was withdrawn by the defendant.
2. Where an action is brought upon a promissory note, with an affidavit of its loss, if the plaintiff has it, at the trial it may be read to the jury.
3. A writing in the form of a promissory note for the payment of a sum of money "in the common currency of Alabama," is not an undertaking to pay the sum expressed in coin, but in bank notes, which was the common currency of the State when the writing was made; consequently it is inadmissible under a declaration describing it as a promissory note for the payment of a sum *in numero*, and unassisted by other proof, it will not sustain a recovery upon the common counts in assumpsit.
4. *Quere*—If the defendant demurs to the evidence adduced by the plaintiff, and the jury notwithstanding return a verdict, and such judgment was rendered as would have been proper on the demurrer, is the failure to withdraw the cause from the jury available on error?

Writ of error to the County Court of Perry.

This was an action of assumpsit, at the suit of the defendant in error against the plaintiff. The first count is on a promissory note, dated the 16th of September, 1842, for the payment of one hundred and fifty dollars, on the first day of January thereafter, to the plaintiff, in Alabama money. To this the common counts are added. There was a demurrer to the first count, and *non assumpsit* and set off, pleaded to the other counts in particular, and also to the entire declaration. No notice seems to have been taken of the demurrer, but the cause was put to the jury on the issues of fact, who returned a verdict in favor of the plaintiff for the amount of the note and interest, and judgment was thereon rendered.

On the trial, the defendant excepted to the ruling of the Court. From the bill of exceptions, it appears that the plaintiff offered to read to the jury a promissory note, subscribed with the defendant's name, of the following tenor, viz: "By the first day of January next, for value received in the rent of land, I promise to pay William C. Davis, one hundred and fifty dollars, in the common currency of Alabama. Sept. 16th day, 1842." And having proved the signature of the maker, offered to read it to the jury, to which the defendant objected; but his objection was overruled, and the note was read. The plaintiff further proved, that the note in question had been lost, as appeared from an affidavit made before the commencement of the suit, and the recital in the declaration, but had been since found, and here closed his testimony. The defendant offered no evidence, but demurred to that adduced by the plaintiff. It is not shown that the County Court disposed of the demurrer, or in any manner noticed the same.

A. Graham, (of Perry,) for the plaintiff in error.

Tho. Chilton, for the defendant.

COLLIER, C. J.—In respect to the demurrer to the first count of the declaration, it must be considered as waived, by the defendant's going to trial without objection, upon the issues of fact. This we have so often held, that it cannot be necessary to cite the numerous cases to the point.

The objection to the admission of the note to the jury was general, without specifying for what cause it was made; and

it is here assigned as error in terms equally indefinite. If it had been placed upon the ground that the note was alledged to have been lost when the suit was commenced, we should not hesitate to say, that the subsequent finding would not prejudice the plaintiff's right of recovery. In such case, the note would not only be admissible evidence, but having found it, the plaintiff could not of course prove its loss at the trial, and if he could not use it to sustain his action, he would be constrained to dismiss his suit, and commence *de novo*. No reason, resting upon principle, is perceived, why such a result should be coerced. If such a course were necessary, this would be to make the plaintiff's good fortune in recovering the evidence of his debt, a real misfortune to him.

But the note should have been excluded, upon the ground that it is not correctly described in the declaration, and does not support either of the common counts. In Young v. Scott, adm'r. 5 Ala. Rep. 475, after noticing the course of decisions in this and other States, we held, that an action of debt would not lie upon a note to pay a sum certain, in *current bank notes*. The reasoning which led to the conclusion attained in that case, was, that bank notes were not money, although they might profess to be its representatives; that the payee did not expect to receive, nor the maker to pay the numerical sum in coin: and that under such circumstances, the measure of the recovery, would be the value of the bank notes reduced to the specie standard, at the time the note matured, with interest.

The note given in evidence in the present case is payable in the *common currency of Alabama*. Currency is a word of extensive application. It means, among other uses, a continual passing from hand to hand, and circulation; as the currency of coin, bank bills, bills of credit, &c. As applied to contracts to pay money, it must be understood in the sense in which the parties intended it, if their intention can be ascertained. We can have no difficulty in determining its meaning in the case before us. The laws of this State have provided for the establishment of Banks, and the emission of a vast paper circulation as the representative of money. This paper we must know at the time the note in question was made, was the *common currency*; it was paid and received in all ordinary

transactions, though it had depreciated greatly below its par value.

This being the case, the note must be regarded as a promise to pay a sum *in numero* in bank bills, and to it, the rule reiterated in Young v. Scott, which admeasures the recovery by the value of the bills, must be applied.

It will result from this view that the note is not correctly described in the first count. There it is said that the promise is to pay in *Alabama money*, which it has been held, is in legal effect, an undertaking to pay in gold or silver. [Carter and Carter v. Penn. 4, Ala. Rep. 140.] Under the first count then the note was inadmissible.

In respect to the common count, without deciding what would have been its effect if assisted by other proof, we are satisfied that *per se* it was insufficient to sustain either of them; because it is not a promise to pay money *prima facie* it was inadmissible, and to have changed the phase of things in this respect, if allowable, the plaintiff should have proposed it in connection with other evidence which was pertinent and material.

Conceding that the demurrer to the evidence was interposed in such form, that the County Court should have withdrawn the cause from the jury, and rendered a judgment without their aid, yet if the verdict and judgment thereon, were such as the judgment should have been upon the demurrer, we would not be inclined to reverse it for a mere harmless irregularity. The record does not state the demurrer, so as to enable us to determine whether it should have been entertained; and we need not add more upon this point of the case.

It sufficiently appears from what has been said, that the judgment must be reversed, and the cause remanded.

GOLDTHWAITE, J—I do not controvert that the opinion just pronounced, is in accordance with previous decisions in this State at an earlier period; but I take occasion to express my dissent from the conclusion, that an undertaking to pay in Alabama money, has the legal effect to warrant a recovery for a less sum in specie.

HOPKINS v GARY, ET. AL.

The question, whether the defendant is, or is not sheriff, is involved in an issue, upon a motion against one as sheriff, for failing to make the money upon an execution.

Writ of error to the County Court of Sumter County.

THIS proceeding is a suggestion by Hopkins, that Gary, as the Sheriff of Sumter, could, by the use of due diligence, have made the money on an execution placed in his hands for collection. In order fully to understand the questions raised in this Court, it is necessary to state at length the proceedings in the Court below.

On the 11th day of July, 1842, a notice was served on Gary, informing him that Hopkins would move the County Court of Sumter County, to cause an issue to be made up to try the fact, whether Gary could with due diligence, have made the amount of a certain execution issued from said Court, and fully described in the previous part of the notice; and, if it should be found that the amount of the same could have been made by the said Gary, then he should move the said Court for judgment against Gary and his sureties for the amount of the execution, with ten per cent. as damages, &c. This notice was executed on Gary, and also on Houston and Tarborough, two of his sureties, but was not executed on the other sureties.

At the July term, 1842, of the Court, a suggestion in these terms was filed: "John H. Hopkins, by attorney, suggests to the Court, that Mathias E. Gary, sheriff of the county aforesaid, could, with due diligence, have made the amount of money specified in an execution, issued out of this Court, and returnable to the present term thereof, in favor of the said plaintiff, and against John McGrew, for 327 13-100 dollars, with interest on the same from the 23d day of February, 1842, and also the sum of 12 18-100 dollars. Which said execution came to the hands of the said sheriff to be executed."

No proceedings seem to have been had on this notice and suggestion, either at the July term, 1842, or at the next term,

but at the July term, 1843, the suggestion was renewed, and the proceedings connected with it are thus stated in the transcript:

"This day came the plaintiff, and suggested in writing to the Court, that M. E. Gary, sheriff of Sumter county, could, &c.—(setting out that the money could have been made by him with due diligence, on a certain execution therein stated.) Upon which suggestion being made, the Court ordered the clerk of said Court to make up the issue by ordering a general denial of the facts suggested. (This denial was written on the back of the notice returnable to the July term, 1842.)—This being done, Samuel W. Inge, Esquire, as *amicus curiæ*, suggested to the Court, that no notice had been given to the sheriff of the suggestion; whereupon the Court decided, that notice was necessary, and the plaintiff's counsel offered to show to the Court, that notice had been given, which the Court ruled it would hear, no objections being made. Whereupon the counsel offered the notice returnable to the July term, 1842, with the Coroner's return thereon. The counsel then swore, that since the last term of the County Court, and during vacation, he had verbally informed Gary, that the motion, which in that notice was proposed to be made at the term before the last, would be renewed at the July term, 1843, and that this verbal notice was given with direct reference to said written notice. And Gary, after some conversation, and an explanation as to what case it was, said he would be ready for trial. Since the present term (July, 1843) the witness again verbally informed Gary of the same facts, and that the motion would be made this day, (the day when the trial was had,) and he again said he would be ready for trial. Whereupon the Court decided, said notice was insufficient, inasmuch as the records did not advise the Court of the continuance of any motion made at the last term of the Court to the present term; and that a notice in writing, advising the sheriff of the suggestion made, was necessary, before a trial could be had, and suggested thereupon that the cause should be continued. The plaintiff's counsel then inquired of the Court, what order it made in the case, and was informed that the Court made no order, but would leave the plaintiff to pursue his own course. The counsel then said, that if the Court ordered that he should

give notice to the sheriff he should decline doing so; to this the Court replied, it would leave the counsel to take his own course. The counsel then said, if the Court permits the plaintiff, he will go to the jury, and the Court answered, that it would interpose no objection to the counsel in managing the case in his own way; that he could go to the jury if he thought proper, but the court would instruct the jury that no notice had been given to the sheriff, and if they should find such to be the fact, the plaintiff could not recover. Whereupon the plaintiff put his case to the jury, and after argument, the Court decided, that it would decline to give the charge previously intended as to notice; but it instructed the jury that the question of notice was not involved in the issue; and the simple question was that presented in the issue; if they found that the sheriff could, with the use of due diligence, have made the money mentioned in the execution, they must find for the plaintiff, provided the plaintiff had also proved to their satisfaction, that Gary, the party sought to be charged as sheriff, was sheriff at the time the want of diligence is charged; otherwise they must find for the defendant. Whereupon the plaintiff excepted.

The bill of exceptions is not certified with the transcript, but one was agreed on by the parties, and substituted by consent. This states that the question, whether Gary was sheriff, was not submitted to the jury for decision, except as it was embraced in the solution of the question, whether Gary could have made the money with due diligence. The Court charged the jury, that the question, whether Gary was sheriff was embraced in the question submitted to them, and that unless the plaintiff had proven that Gary was sheriff, they must find for the defendant.

A verdict was found for the defendant, on which he had judgment.

The plaintiff prosecutes the writ of error, and here assigns that the Court erred:

1. Because the judgment entry contains matter not proper for a judgment, and creating unnecessary cost.

2. In deciding that the sheriff had no notice.

3. In the intimations, as shown by the judgment entry,

which were calculated to prejudice the jury against the plaintiff's right, on the facts.

4. In assuming a fact in the case, that no notice had been given, and then determining that it was a question for the jury.

5. In the charge to the jury as shown by the bill of exceptions.

R. H. Smith, for the plaintiff in error, made the following points:

1. No notice was necessary. [Clay's Dig., 218, § 85; Reid v. Planters' and Merchants' Bank, 3 Ala. Rep., N. S. 713; 6 Porter, 48; Minor, 376; Neal v. Caldwell, 3 Stew. 134.]

2. If notice was necessary, the duty of the Court was to see it given. [Kirkman v. Harkins, 1 Porter, 22; Reid v. Jackson, 1 Ala. Rep. N. S. 207.]

3. As the plaintiff was allowed to go to the jury, he was authorized to infer that the Court had seen proper notice given.

4. The sheriff had pleaded no plea denying the character in which he was sued, and if a notice to him is to be presumed, from the fact, that the Court permitted the plaintiff to go to the jury, then the question, whether Gary was sheriff, did not arise at the trial. [Jemison v. Harper, 1 Porter, 431; 1 S. & P., 546; 4 Ala. Rep. 214; Ib. 296.]

5. That a sufficient notice was given.

6. An issue was formed.

7. If it was necessary to prove Gary's character as sheriff, this was a question for the Court and not for the jury. [Reid v. Bank, 3 Ala. Rep. 712; Minor, 376; 1 S. & P. 471; Neal v. Caldwell, 3 Stew. 134.]

8. The Court officially knew its own sheriff.

S. W. Inge, contra, insisted there was no other question in the case but that arising out of the bill of exceptions.

Every Court it is true must know its own officers for the time being, but that is a different question from knowing that he was in office at a previous time, and when a default is charged. But the inquiry, of sheriff or no sheriff, is necessarily involved in every inquiry of due diligence, because if the

party is not in office he cannot be chargeable. Independent of this, it frequently becomes important to such an inquiry, to ascertain with exactness, when an officer became such.

GOLDTHWAITE, J.—We throw aside all the assignments of error in this case, except the last, with the general remark, that they present matters that we cannot revise, whatever may have been their effect upon the case in the Court below. We may regret the unnecessary prolixity of the judgment entry, but we are not aware that this fault should be visited on a party who seems to have had no agency whatever in making it so. It is possible too, that the conversation between the counsel on one side and the Court, may have produced some effect on the jury; but were we to reverse causes for such reasons, we fear that oftentimes, the substantial justice of a case would be defeated without any reason whatever.

To proceed then to the examination of the only question presented in such a manner as to admit of consideration here. It seems the County Court charged the jury, that the question, whether Gary was sheriff was involved in the issue to be tried by them; and unless this had been proved, that there finding should be for the defendant. It is difficult to conceive of any state of facts that could be before the jury, under such an issue as this, in which this proof would not stand out in bold relief. If the execution was before them, it was probably shown to have been in the defendant's hands as sheriff; if it was indorsed with the time when received, as required by law, that was proof; if it was returned by him the same conclusion would follow. Easy as the proof was, it nevertheless was a matter embraced in the issue, and if not proved the defendant was entitled to a verdict. That the question of sheriff or no sheriff is embraced in this issue would be evident, if we suppose a suggestion of this kind; or what is really the same thing, an action brought against one who is not, nor never was sheriff, there is no reason to doubt that such a one cannot be charged. Again, let us suppose a sheriff qualified on some particular day, and the attempt is to charge him for not making the money upon an execution against a person who has previously parted with his property; is it not evident that the question then is, whether the sheriff was author-

ized to act at the time when action could be effectual? Indeed we can conceive of no suit against a sheriff for negligence, or breach of duty of any kind, where this question is not necessarily involved.

We see enough in this transcript to satisfy us that the Court was not disposed to add an explanation to any charge requested by either party; nor can we say, strictly speaking, that the law imposes any such duty on a Court; generally to speak, a Court is passive and waits to be excited to action by either of the parties; and we are not authorized to infer, either in this or any other case, that a general charge, strictly correct by itself, would not have been modified to suit the particular circumstances if a request had been made. If there was any fact before the jury which established that Gary was sheriff, nothing was more easy than to request instructions as to its effect as proof.

In the condition in which this case is, it is possible that injustice has been done, but we are not authorized to infer this from the mere fact, that a general charge, unexceptionable in point of law has not been explained or exemplified by the Court of its own mere motion.

Let the judgment be affirmed.

DE MONY, GARNISHEE, v. JOHNSTON.

1. The debtor of a corporation may be garnisheed by a creditor of the corporation under the general law of garnishment; but no proceeding can be had under the act of 1841, to subject the debts of stockholders for stock due the company, on process of garnishment, issuing previous to the passage of that act.

Error to the County Court of Mobile.

THE plaintiff made affidavit that he had recovered judgment against the Mobile Cotton Press and Building Company, for the sum of $8,689 66-000, and that the corporation had no property in its possession, within his knowledge, to satisfy the

judgment, and prayed process of garnishment against the plaintiff in error, and others. Process of garnishment having issued, and been executed, a judgment *nisi*, was taken against the plaintiff in error, and afterwards set aside, and at the March term, 1843, a judgment was rendered against him as recited in the judgment upon his answer for $875.

The record then shows an answer dated 19th February, 1844, denying that the garnishee is a stockholder in the corporation, and denying any indebtedness. The answer being controverted on oath, an issue was made up to ascertain whether the garnishee was indebted to the corporation, upon which the jury found that he was indebted to the corporation in the sum of $1,292, at the time of the service of the garnishment, and for that sum the Court rendered judgment against him. He now prosecutes this writ, and assigns for error—

1. That the Court had no jurisdiction.
2. That the verdict did not respond to the issue.
3. No verdict could be rendered upon the issue.
4. The judgment should not have been reversed.
5. The garnishment did not conform to the statute.

Campbell, for plaintiff in error. This proceeding could only be had under the act of 1841, which was not in existence when this garnishment was sued out. The act does not apply to garnishments then existing.

Stewart, contra. This proceeding was not had under the act of 1841. By the general attachment law the debtor of a corporation may be garnisheed upon a judgment against it. The answer of the garnishee cannot be looked to, as it is no part of the record; [3 Ala. Rep. 114] and the finding of the jury under the issue is conclusive of the indebtedness of the garnishee.

ORMOND, J.—There can be no doubt that the debtor of a corporation might be garnisheed by the law as it stood previous to the passage of the act of 1841, for the more speedy collection of debts against corporations, after a judgment obtained against it, and the proper affidavit being made. The design of the act of 1841, was to subject the stockholders of a corporation to process of garnishment for the amount of stock subscribed by them and unpaid.

The affidavit and the writ of garnishment proceed upon the supposition that the garnishee is a debtor to the corporation. The answer denies any indebtedness and insists that the garnishee is not a stockholder, or responsible to the company as such. The issue tried, was whether the defendant was indebted to the corporation, when the garnishment issued. As we are not informed of the facts before the jury, we cannot determine from the record whether the indebtedness of the garnishee to the corporation, ascertained by the verdict of the jury, was founded upon his non-payment of the stock, or upon any other independent contract with the company. No question therefore arises under the act of 1841, by virtue of which it is clear that this action could not be maintained, as the process was sued out before the passage of the act. [Bingham v. Rushing, 5 Al. Rep. 403.]

It appears by the return to the *certiorari* that a judgment, such as is described in the affidavit, was obtained by the defendant in error against the corporation, the judgment of the Court therefore against the garnishee must be affirmed.

LANGDON & CO. v. BRUMBY, ADM'R.

1. The only proper issue upon the trial of the right of property under the statute, is an affirmation on the part of the plaintiff that the property in question is subject to his execution, and a denial of that fact by the defendant; consequently a plea which alledges that the same property has been levied on at the suit of another execution creditor, a claim interposed and bond given with surety to try the right, will not be entertained, even if the proof of such facts would avail before the jury.
2. Although goods are levied on by a junior execution, and delivered to a third person, who has interposed a claim and given bond with surety as required by law, yet it will be competent to levy on the same by a *fieri facias*, the lien of which first commenced and still continues. But if the older execution is first levied and proceedings instituted to try a claim, a junior execution cannot be levied on the same property.

Writ of error to the Circuit Court of Perry.

This was a proceeding under the statute for the trial of the right of property. The defendants in error caused a writ of *fieri facias* issued upon a judgment recovered by them, against the "Trustees of Madison College," to be levied by the sheriff of Perry, on the apparatus supposed to belong to the defendants in execution; to which the intestate of the defendant in error interposed a claim, and entered into bond with sureties according to law. The claimant died, pending the suit, and it was revived in the name of his administrator.

An issue was made up in the usual form, referring it to the jury to determine whether the property in question was subject to the plaintiff's execution. In addition to this, the claimant pleaded, that the identical apparatus had been previously levied on by a *fieri facias*, at the suit of Beverly Crawford, against the defendant in execution, that the intestate had regularly interposed a claim to the same, which was pending in the Circuit Court of Perry, at the time of, and long after the levy of the execution, and the return of the claim in the present case, &c. To this plea the plaintiff demurred, and his demurrer being overruled, he replied that the *fieri facias* at the suit of L. & C. C. Langdon & Co. first issued and acquired a prior lien, to that of Beverly Crawford, which was first levied. The claimant demurred to this replication, his demurrer was likewise sustained, and the Court adjudged that the claim be quashed; that the levy of the execution on the apparatus is not sufficient to enable the plaintiff in execution to maintain a trial of the right of property in relation to the same; and that the claimant recover of the plaintiff in execution his costs.

A. Graham, (of Perry,) with whom was E. W. Peck and L. Clark, for the plaintiffs in error, contended that the previous levy and claim of property, did not prevent the levy of the plaintiff's execution; especially as being older in date it created a superior lien. [2 Porter's Rep. 5; 3 Ib. 138; 1 Ala. Rep. N. S. 678; 2 Ib. 684; 5 Mass. Rep. 271; 1 McMullan's Rep. 000; 10 Peter's, 404; 13 Pet. Rep. 151.]

A. F. Hopkins, for the defendant in error. The matter stated in the plea is a bar to the proceeding by the plaintiff—it shows that at the time their execution was levied, the apparatus was in the custody of the law, and not subject to seizure

and sale. [4 Bac. Ab. 389; 10 Pet. Rep. 400; 3 Porter's Rep. 138.] Rives & Owen v. Willborne, 6 Ala. Rep. 45, is a case directly in point. If this view be correct, it is immaterial which of the parties at whose suit the apparatus was levied on, first caused their execution to be issued. The question of priority of lien does not arise.

COLLIER, C. J.—In the P. & M. Bank v. Willis & Co. 5 Ala. Rep. 770, it was held, that although the statute directed the Court to require the parties to make up an issue, under such rules as it might prescribe for the trial of the question of right, yet the only proper issue in all such cases was an affirmation on the part of the plaintiff, that the property levied on was subject to the execution, and a denial of that fact by the claimant. In the present case, an issue was thus formed, and the claimant was then allowed to plead, that the property was not subject to the plaintiff's execution, for certain reasons, which are specially stated. The effect of this plea was to prevent a trial upon the general question of the liability of the apparatus, to the satisfaction of the plaintiffs execution, and limit the inquiries to a single point, either of law or fact, according as the plaintiff might elect to treat it. This could not be done by any proceeding interposed by the claimant. The statute entitled the plaintiff to a jury trial, if the cause was in Court in a condition to be tried, and the case cited, shows how the issue shall be framed. Here the Court determined that the levy of the execution did not entitle the plaintiff to a trial of the right of property, and rendered a judgment against him for costs.

It is no answer to this view to say, the facts set forth in the plea, if true, show that the property in question is not liable to the plaintiff's execution, and that the demurrer is an admission of their truth. A demurrer admits the truth of the facts, if well pleaded, but presents to the Court the decision of their legal sufficiency to bar the action, and the question whether they are interposed in such a manner as to make them available. If the determination be favorable to the party demurring upon either of these points, the plea should be adjudged bad. We have seen that the plea, irrespective of its extrinsic merits, could not be entertained.

In Rives & Owen v. Willborne, 6 Ala. Rep. 45, an execution was levied on a slave, a claim made by a third person, and a bond given to try the right. The cause was tried by a jury upon an issue in the usual form. On the trial, the claimant proved that some months previous to the levy of the execution the slave in question was seized under three attachments, and replevy bonds given for his forthcoming according to law. In these bonds the claimant was a surety, and as such interposed his claim to arrest a sale under the execution. The Circuit Court charged the jury, that the slave when levied on was in custody of the law by virtue of the levy of the attachments and proceedings thereon; and consequently was not subject to the levy of the execution when it was made.

In the case cited it appears, that judgments were rendered in the suits commenced by attachment two weeks previous to the levy of the execution, but it was not shown that any proceedings had been had on the judgments. This Court laid no stress upon the proceedings had in the attachment, subsequent to the execution of the replevy bonds, but considering that the effect of these was to withdraw the slave from a liability to seizure and sale, affirmed the judgment of the Court below.

If the special plea and replication state the facts of this case correctly, it differs from Rives & Owen v. Willborne, in this—here, the process under which the property was levied on, created a prior lien to that under which the levy had been made, and bond previously given to try the right; there, the claim had been interposed to stop a sale and try the right, upon the ground that the property had been placed in the custody of the law in virtue of proceedings which operated a paramount lien.

By the second section of the act of 1838, "relative to the satisfaction of executions," it is enacted, that "the lien created by the delivery of an execution from a Court of record to the sheriff, shall continue to bind the property of the defendant as between different judgment creditors in the Courts of record in this State, in the following manner, viz: if a term shall elapse after the return of the first execution, before an *alias* shall be be sued out and delivered to the sheriff, the lien created by the delivery of the first writ of execution, shall be cancelled and of no avail; but if a term shall not have elapsed, and the *alias*

shall be delivered to the sheriff before the sale of property, under a junior execution in favor of another creditor, the lien shall continue, notwithstanding the *alias* may not have been delivered until after such junior execution; but if such *alias* shall not be delivered, until after the sale under such junior execution, the lien of the latter shall prevail." [Clay's Dig. 209, § 43.] The eighth section of the act of 1807, "concerning executions, &c.," declares that a *fieri facias* or other writ of execution, shall only bind the property of the goods against which such writ is sued forth, from the time such writ shall be delivered to the sheriff, &c. [Clay's Dig. 208, § 41.]

The view we have taken of the plea as applied to the present case, will relieve us from the necessity of giving to the replication a critical examination; and without inquiring whether the plaintiff's execution exerted a lien paramount to that of Crawford's, we will consider the question in hand, upon the hypothesis that such was its effect.

By the common law, the goods of a party against whom a *fieri facias* issued, were bound as against the party himself, and all claiming by assignment from, or by representation under him, from the test of the writ. The act of 1807, did not create the right of lien, but rather limited its retrospective operation, by declaring that it should only become effective from the time the writ is placed in the sheriff's hands. This lien is a right so much respected by the law, that where it once attaches it will not be divested, though the property of the debtor has been seized under a previous execution. And although the original execution may not have been levied, yet if the plaintiff continues its efficacy by causing an *alias*, &c., to be regularly issued from term to term, his lien overreaches a *fieri facias* of a younger date, which has been actually levied, and if in the sheriff's, hands will be entitled to the proceeds of the sale.

In the case before us, if the plaintiff's execution first operated a lien upon the estate of the defendant in execution, then they would be entitled to the proceeds of the property in question, if they caused it to be regularly issued as the act of 1828 requires, should Crawford succeed in condemning it. The claimant, by the terms of his bond, stipulated for the return of

the property, in the event that he was unsuccessful in the assertion of his claim. Notwithstanding these positive terms, the claimant would not be held to a performance of the condition of his bond, if the property should be wrested from his possession by the authority of law, which he could not control. This principle would apply where the property was seized under an execution, which exerted a superior lien. Of course, this reasoning is founded upon the supposition, that the goods in dispute belonged to the debtor; for if they were the claimants, neither of the execution creditors, could insist upon their appropriation. From this view of the law it results, that although goods are levied on by a junior execution, and delivered to a claimant, who has interposed a claim and given bond with surety as required by law, yet such proceeding will not prevent the levy of a *fieri facias*, the lien of which commenced first and still continues.

The same principles will not apply where the senior *fieri facias* is first levied, and under it, proceedings are instituted to try a claim. There it would be no answer for the claimant to say, that the goods had been taken from his custody by a junior execution; and, in such case, if he were unwilling or unable to interpose a second claim, he would be answerable upon his bond if they should be condemned, and he could not not produce them.

In respect to the case of Rives & Owen v. Wilborne, speaking for myself alone, I would remark that I have bestowed much reflection upon the principle upon which it rests. I have frequently thought and conversed about it since the decision of Hagan v. Lucas, 10 Pet. Rep. 400. I have examined our statutes in respect to the trial of the right of property—I have scanned the arguments that have suggested themselves to me, or have been urged by others, both for and against that case; and am free to declare that on either side they are potent and embarrassing. In favor of it, it is said that the opposite conclusion would be oppressive and sometimes utterly destructive of the rights of the honest claimant; against it, is said, that it enables the debtor by a combination with a third person to interpose a claim through dishonest motives, only to withdraw the property from the just demands of the creditors. In this *equilibrium* of the argument upon consequences, the safe

course is to consult the written law, the nature, design and character of the proceeding for which it provides, and regulates. If untrammelled by legislation, I have no doubt, but rules upon this subject might be laid down, embracing a more enlarged equity, and more generally promotive of justice. But keeping in view our statutes, I am persuaded that the case referred to, is, as consonant to the provisions as any decision we would be likely to make, if the question were *res integra*. I have not, therefore, the slightest wish to prescribe any other limitation upon the general terms in which we have heretofore expressed ourselves, than that already stated in this opinion.

Without stopping to recapitulate, it is enough to add, that the judgment of the Circuit Court is reversed, and the cause remanded.

MONROE & TARDY v. BRADY.

1. When an appeal is taken, in an admiralty suit, from the judgment of a justice of the peace, rendered in the city of Mobile, it is no valid objection in the Circuit Court, that the justice was elected for a country beat, and therefore, under the statute disqualified to act in the city.
2. Objections to the sufficiency of a libel in an admiralty suit should be made in the Court below, and are too late when taken in the appellate Court.
3. A justice of the peace has jurisdiction under the acts of 1824 and 1841, in libel suits, by material men, &c. against a coasting steamboat, when the sum claimed is not more than fifty dollars.
4. This jurisdiction is not taken away by the circumstance, that the steamboat is employed in conveying the mail of the United States.
5. When there are several suits, by material men, laborers, &c. against a steamboat, commenced before a justice of the peace and removed into the Circuit Court by appeal, it is not an error which can be revised here, for that Court to refuse to consolidate the causes; although the consolidation would have been properly ordered by the Circuit Court.
6. The omission to render a judgment of condemnation against a steamboat, when an appeal is taken by one on behalf of the owners, is not an error of which the parties to the appeal bond will be permitted to complain, as they cannot be prejudiced by it. The omission in such a case is clerical, and might be corrected on motion if necessary.

Writ of error to the Circuit Court of Mobile.

On the 18th of April, 1842, the defendant in error exhibited his libel in nature of a proceeding in admiralty, before a justice of the peace of Mobile, praying that process might issue according to the statute of the 19th of December, 1841, againt the steamboat Caroline, her tackle, apparel and furniture, and that all persons having, or pretending to have any right, title, or interest to the same, may be summoned, &c. The ground of complaint is thus pronounced, viz: "That the said steamboat is now navigating the waters of this State and within the port of Mobile; that at the instance of the master of the said steamboat and his agents, and during the time the said steamboat was navigating the waters of this State, the libellant was employed to repair the boiler of said boat at the rate of $3 50-100 per day, and to be found in board; and that he so worked seven days receiving only five dollars in part payment. That the particulars of said steamboat are more fully shown by the account filed with this libel, amounting in the whole to nineteen dollars and fifty cents; and which is now justly due to him this libellant."

The justice of the peace issued a warrant of attachment according to the prayer of the libel, returnable on the 28th day of April, 1842; on the day on which it issued it was placed in the hands of a constable who returned that he had executed it by the seizure of the Caroline, and that a bond had been given. A judgment was rendered by the justice in favor of the libellant for the sum claimed by him, and condemning the boat, her apparel, &c., for the satisfaction of the same. Whereupon Hugh Monroe, with B. Tardy as his surety entered into bond for the prosecution of an appeal to the Circuit Court.

The cause was tried at the first term after it reached the appellate Court. Previous to the trial the appellant excepted to the ruling of the Court. It appears from the bill of exceptions that the libellant proved his account as alledged in his libel; thereupon the appellant being duly admitted as claimant of the Caroline, moved the Court by his Proctor to dismiss the libel, for the following reasons: 1. Because, the justice of the peace who issued the same, was elected and qualified as such for a beat without the corporate limits of the city

of Mobile, and that the issuing of process in this cause as well as its adjudication, was in the city of Mobile. 2. Because, the justice could not lawfully take cognizance of the case, inasmuch as there were five other claims for work and labor done on the boiler of the Caroline, at the same time the work was done for which this suit was brought. On all of which separate libels were issued by the justice at the same time—the aggregate amount of which is $128 37-100. Both of which reasons were sustained by proof and overruled by the Court.

The claimants then moved the Court to consolidate the six cases of which this is one, it being shown in addition to the above facts, that they were all before the Circuit Court by appeal. This motion was also overruled.

It was further shown by the claimants that the Caroline was, at the time she was libelled, regularly licensed for the coasting trade, and employed as United States mail boat between the cities of Mobile and New Orleans, and that the work done by libellants was to enable her to proceed to sea, with safety: that the Caroline did not then, nor never had navigated the waters of this State, as charged in the bill. Thereupon the claimants moved the Court to dismiss the bill, which motion was overruled.

G. N. Stewart, for the plaintiff in error made the following points;

1. That the justice of the peace before whom the libel was exhibited, had no jurisdiction of the cause at the place where he exercised it. [Aik. Dig. 299, Sec. 2; 300 § 5, 625, 631–2; Meek Sup. 114.]

2. The libel does not show that there was a lien upon the boat; because it does not alledge that the work was done after the first day of July next preceding the commencement of the suit. [Clay's Dig. 139, § 2, 140.]

3. The statute extends the jurisdiction of justices of the peace in cases like the present, where the vessel proceeded against, navigates the internal waters of the State. [Clay's Dig. 139.] The act of 1824 applies to ships, &c. navigating the ocean, &c., and in such cases the lien continues only up to the time of its sailing next after the lien attaches. [Clay's

Dig. 537–8.] The proof shows that the vessel was engaged in the coasting trade, (11 Peter's Rep. 175,) and actually carrying the United States mail.

4. Six cases should have been embraced by one bill, and the motion to consolidate should have been granted by the Circuit Court.

5. The Court rendered judgment without sufficient proof of the existence of the lien and the liability of the boat, or of the indebtedness of its owner or master; and this, although there was neither a default or a verdict.

6. The judgment of the Circuit Court was not *in rem*, as was that of the justice, but it was for a sum of money.

E. S. Dargan, for the defendant.

GOLDTHWAITE, J.—1. The objection to the proceedings, that the justice determined the case in the city of Mobile, when he was elected for a beat without the corporate limits, is in effect asserting that the trial was had before a person who was entirely unauthorized to act; conceding to this objection its most imposing aspect, we do not think this question can be raised in this way. If the justice was unauthorized to act in the premises he was a trespasser, and as such is liable to the party for his illegal act; but by the appeal the judicial character of the justice is admitted, inasmuch as it establishes a legal connection between him and the appellate Court. If he is not a justice of the peace it is clear that no appeal will lie.

2. The objections to the sufficiency of the libel came too late in an appellate Court. [Witherspoon v. Wallis, 2 Ala. Rep. 667.]

3. But it is contended, the proof shown by the bill of exceptions establishes that, *the plaintiff* has no right to pursue this boat, inasmuch as it is a coasting vessel, and in the employ of the United States by carrying the mail. The act of 1836, (Clay's Dig. 139, § 22,) is much more general in terms than that of 1824, (Ib. 527, § 5, 6, 7,) and gives a lien to be enforced by libel, to all persons who shall furnish materials, laborers, or slaves, for the use of any steamboat or other water craft within the State of Alabama. And the act of 1841, (Ib. 340, § 26) expressly gives the same jurisdiction to

justices of the peace to the amount of 50 dollars. It is doubtless true, that on account of this boat being a coasting vessel, the admiralty Courts of the United States may have concurrent jurisdiction, but we are not certain that this necessarily ousts the jurisdiction thus expressly given to our own Courts.

4. Nor is the circumstance, that this boat was employed in carrying the mail of the United States, one from which its owners can claim exemption from the ordinary mode of proceding to which all other persons are subjected.

5. The omission to consolidate the several causes is not an error which is susceptible of revision here, though doubtless the consolidation ought to have been made by the Circuit Court, as it would at least have saved much expense to the parties.

6. We cannot infer that the proof was insufficient to establish the lein, or show the liability of the boat. If it was as is supposed, the party should have shown it by the proper exceptions.

7. The remaining assignment of error questions the legal sufficiency of the judgment, because no condemnation was entered against the boat, and, instead, a judgment *in rem* is rendered against the parties to the appeal bond.

It certainly is true, that this judgment is irregular, and should have been for the condemnation of the boat, inasmuch as the boat was not discharged from the lien, by the claimant, entering into the ordinary stipulation provided for by the act.—[Clay's Digest, 139, § 22.] But it appears that Monroe took the appeal in behalf of the owners of the boat and gave bond, with Tardy, conditioned to prosecute the appeal to effect, and to abide by and perform the judgment of the appellate Court in the premises. This is substantially the form of the condition required by the statute, (Clay's Digest, 314, § 9,) and would warrant the judgment in ordinary cases against all the parties to it. Here, from the nature of the proceedings, there is no principal against whom to render a judgment, and as the parties by whom the bond is given are at once liable to have judgment rendered against them, no injury results from the omission to render a formal judgment of condemnation. It might be important to the plaintiffs to have execution against the boat, if the sureties of the bond are unable to pay, but in

no way does the omission affect the persons who now complain of it. The bill of exceptions and other part of the proceedings sufficiently show that judgment was given for the plaintiff, and therefore the clerical omission could be corrected if necessary on motion.

Judgment affirmed.

BROCK & YOUNGUE v. YOUNGUE.

1. In a controversy between a purchaser at an execution sale, made upon the original judgment after its affirmance in the Supreme Court on a writ of error, superseded by bond and surety, and one claiming by a conveyance from the defendant in execution, executed pending the cause in the Supreme Court, the title of the latter will prevail.

Whether the rule would not be different if the contest was between the defendant in execution and a purchaser at such sale.—*Quere?*

Error to the Circuit Court of Talladega.

TRESPASS to try title to a tract of land. The plaintiff claimed as a purchaser at an execution sale, upon a judgment against David Conner, rendered 11th May, 1838. The sale was made the 3d August, 1840. He produced the sheriff's deed and proved possession in the defendant to the judgment at the time of its rendition.

The defendant relied on a conveyance to him of the land, by David Conner, executed the 8th January, 1839, and possession. It was also proved that the defendant Conner, prosecuted a writ of error to the Supreme Court, on the 29th September, 1838, and gave bond and security to supersede the execution, and that the judgment was affirmed against Conner and his sureties, in the Supreme Court, on the 6th February, 1839. The facts being agreed, the Court rendered judgment for the defendant, from which this writ is prosecuted.

RICE, for plaintiff in error, contended that the sheriff's deed was conclusive, and could not be collaterally impeached.

That notwithstanding the execution under which the land was sold, was sued out upon the judgment of the Circuit Court, after its affirmance in the Supreme Court, that the execution was not void, but voidable only. He cited 2 Ala. Rep. 734; 4 Ib. 9, 19, 321; 5 Ib. 58; 4 Wend. 462.

WM. CHILTON, contra.

ORMOND, J—Both parties deduce title from the defendant in execution; the plaintiff, by a purchase at an execution sale, the defendant by a conveyance. It is therefore only necessary to inquire whether the defendant in execution had the right to convey the title, if he had the title of the defendants in error, being prior in point of time, must prevail.

The judgment under which the plaintiff deduces his title, was carried to this Court by writ of error, and bond and security given to supersede the execution. The effect of this was to discharge the *lien* of the judgment as decreed by this Court in Campbell v. Spence, 4th Ala. Rep. 543. After the *lien* created by the judgment was thus discharged, the defendants purchased from Conner, the defendant to the judgment, and it is therefore obvious that his title is superior to that of the plaintiff's, derived from a sale by virtue of the judgment after its affirmance in this Court. The *lien* of the judgments being discharged by the supersedeas, is, as to all rights acquired after such discharge, as if it never had existed. The subsequent affirmance in this Court did not restore the former *lien*, but was the foundation of a new *lien* from the date of the affirmed judgment.

Whether the argument of the plaintiff's counsel might not apply, if the controversy was between the defendant in execution and a purchaser under the judgment, is a question we need not decide.

Let the judgment be affirmed.

LOGAN v. HODGES' ADM'R.

1. Where the defendant offers himself as a witness to support the plea of usury under the act of 1819, and the plaintiff states on oath that the note declared on, is not tainted with usury, sets out what was its true consideration, and thus negatives what the defendant had deposed, the testimony of both should be rejected *in toto;* consequently it is error to instruct the jury, that so far as the defendant was uncontradicted his evidence was properly before them, and that they should consider that part of his evidence that was contradicted, if corroborated by other proof.
2. A party to a suit may be the bearer of a deposition taken at his own instance, from the commissioner to the clerk of the Court where the cause is pending, and make the usual declaration that he delivered it in the same condition in which he had received it.

Writ of error to the County Court of Sumter.

THIS was a suit commenced originally before a justice of the peace against the intestate of the defendant in error; after judgment in favor of the plaintiff, the case was removed by *certiorari* to the County Court. The plaintiff then filed his statement upon a promissory note for the payment to him of forty-five dollars by the defendant; and the cause was tried on the plea of non assumpsit, payment, usury and want of consideration.

On the trial the plaintiff excepted to the ruling of the Court. It appears that the intestate proposed to prove by his own testimony, that the note in question was founded on a usurious consideration; whereupon the plaintiff offered to deny upon oath, the truth of what it was stated the intestate would testify. The Court, however, permitted the intestate to give testimony in the hearing of the jury, to circumstances showing that the note formed part of a usurious contract between him and the plaintiff, and was itself wholly tainted with usury.

The plaintiff denied upon oath that any part of the note sued on was usurious, and stated he had paid a debt for the defendant to a third person in order to disincumber the title to a tract of land, which he had sold to the plaintiff, and that the note was given in consideration thereof. Thereupon the plaintiff moved the Court to reject the testimony of the intes-

tate, but his motion was rejected, and the Court determined that the testimony was admissible as far as it was not contradicted.

The Court instructed the jury that the evidence of Hodges, so far as it was uncontradicted, was properly before them, but did not particularize what portion of the evidence they should disregard.

The Court permitted the intestate to read to the jury a deposition material to his defence, which he himself brought into Court, upon an affidavit being made by him, that he had received it of the commissioner and delivered it to the clerk in the same good order in which he received it: and this was permitted in despite of an objection by the plaintiff.

To an inquiry by the jury, the Court answered, that they were to take all the intestate's testimony, which was material, and which had not been ruled out by the Court, and which was uncontradicted by the plaintiff; also the part that was contradicted, if corroborated by other evidence. These several decisions are all reserved by the bill of exceptions. The jury returned a verdict for the intestate, and thereupon judgment was rendered.

S. B. Boyd, for the plaintiff in error. The denial by the plaintiff of what the defendant testified, or proposed to state, should have induced the exclusion of the latter as a witness. [Clay's Digest 590, § 5.] The defendant could only have given evidence to the fact of the usury, if not disputed, but here he was allowed to become a witness generally in his own favor; and this although the plaintiff, denied under oath, that there was any usury in the transaction which induced the making of the note in suit. [Richards et al. v. Griffin, 5 Ala. Rep. 195.]

The County Court also erred in admitting the deposition in evidence under the circumstances in which it was received from the commissioners, and deposited with the clerk of the Court.

Hair & Hoit, for the defendant in error.

COLLIER, C. J.—The fifth section of the act of 1819, "to regulate the rate of interest," enacts, that "when any suit or action may be brought in any Court of record in this State,

touching or concerning any usurious bond, specialty, promise or agreement, the borrower or party to such usurious bond, specialty, contract, promise or agreement, from whom such higher rate of interest is or shall be taken, shall be a good and sufficient witness to give evidence of such offence: *Provided*, that any person against whom such evidence is offered to be given, will deny upon oath to be administered in open Court, the truth of what such witness offers to swear against him, then such evidence shall not be admitted, &c." [Clay's Dig. 590.] Without stopping to inquire whether the facts testified by the defendant should not have been first stated and submitted to the plaintiff, that he might determine whether he could deny them in the manner prescribed by the statute, we are satisfied that the recital of his testimony set out in the bill of exceptions, is a full denial of the defendants statement. He declares not only that the note was not tainted with usury, but he sets out what he affirms to be its consideration, and thus completely negatives what the defendant had deposed.

In this posture of the case, the Court should have rejected *in toto* what the defendant testified. But instead of thus ruling, it was adjudged that so far as he was uncontradicted his testimony was properly before the jury; and even further, that they should take the part of his evidence that was contradicted, if corroborated by other proof.

It was no objection to the admission of the deposition that the defendant was the bearer of it from the commissioner to the clerk of the Court, and himself deposed, that he had delivered it in the same condition in which he received it. Such a course of procedure is not inhibited by the rule which declares, that one shall not be a witness in his own cause; for his statement was of a fact merely preliminary to the admission of the evidence, and intended to prevent spurious testimony from being imposed upon the Courts. If the plaintiff had reason for believing the deposition had been interpolated or otherwise altered, he might, upon application to the County Court, have obtained a continuance in order to take it *de novo*, or to procure the necessary proof to have it suppressed. But the practice which permits parties to bring their own depositions into Court, is too strongly commended by conve-

nience, and too long sanctioned, both by judicial acquiescence and even express decision, to be now departed from.

Without adding any thing more, it has been already shown that the County Court erred in the admission of the defendant's testimony, and in the instructions to the jury. The judgment is consequently reversed and the cause remanded.

THE STATE v. NEWMAN & LEVIE.

1. Under an indictment for selling to a slave, without the consent of his master, one yard of cotton cloth, it is not necessary that the evidence should prove that the cloth sold was of cotton.
2. In every criminal case, the defendant's guilt must be made out by evidence of a conclusive nature and tendency, and must exclude any reasonable supposition of innocence.

On points reserved by the Circuit Court of Lowndes as novel and difficult.

The defendants were indicted for selling to a slave one yard of cotton cloth, without the consent of his master, &c. At the trial there was proof tending to show that the defendants delivered to the slave a whole piece of cloth. They asked the Court to charge the jury, unless they were convinced from the evidence that the cloth sold was "*cotton cloth*," as charged in the indictment, they could not find the defendants guilty. This was refused, and the jury was instructed that it did not matter what species of cloth was sold, if the jury were satisfied that any cloth was sold by the defendants to the slave. The defendants further asked the Court to charge the jury, (the evidence being circumstantial,) that it must point to the defendants guilt so strongly as to exclude every other reasonable hypothesis. This the Court refused, and charged the jury that this was a rule of law applicable to capital cases, but did not apply to misdemeanors to the extent stated. Both questions, however, were reserved for the consideration of this Court, as novel and difficult.

G. W. Gayle, for the defendants.
Attorney General, contra.

GOLDTHWAITE, J.—1. We do not think that the cases cited have any direct application to that before us. In prosecutions for larceny, the identical thing alledged to be stolen constitutes the gist of the offence, and therefore no latitude can be indulged in the description. Another reason in such cases is, that the indictment must be sufficiently certain in description to convict the defendant if he is subsequently prosecuted for the same offence. [State v. Murphy, at this term.] Under the statute upon which the prosecution is founded the offence is the trading with the slave for any commodity without the consent of the master, &c. The consequence is, that it is less material to inquire what was sold, than it is, that it was a commodity, within the terms of the statute. It would have been sufficient to alledge generally a yard of cloth, and its fabric or color is not essential. We, therefore, come to the conclusion there is error in refusing the charge asked for in this connection.

2. The other charge ought to have been given. It is essential that the evidence in every criminal case should be of a conclusive nature and tendency; this can never be where it does not exclude all reasonable doubts of the guilt of the person upon trial. If then the evidence is of such a nature as not to exclude a reasonable supposition of innocence, it cannot with propriety be said to be sufficient to convict. The true rule on this subject is stated in The State v. Marler, 2 Ala. Rep. 43; and is, that the jury must be satisfied beyond a reasonable doubt of the guilt of the prisoner; this can never be the case so long as the evidence does not exclude any reasonable supposition of innocence. [The State v. Murphy, at this term.]

For the error in this charge the judgment must be reversed, and the cause remanded for another trial.

BECK v. SIMMONS & KORNEGAY.

1. A Court of Chancery may refuse to rescind a contract where it would not specifically enforce it at the suit of the other party.
2. Where one proceeds in a contract for the exchange of lands, so far as to obtain the possession with knowledge of a defect in the title, he cannot afterwards object to the title as a reason for not completing the contract, unless there is unreasonable delay in procuring the title, or in curing the defect. If he knows that the defect can only be obviated by a judicial proceeding, the time stipulated for the completion of the contract will not be considered an essential ingredient. In such cases the question is not, whether the party is able to make title on the day stipulated, but whether there has been unreasonable delay in obtaining title.
3. If one purchases lands to which he knows the title is defective, accepts a deed for it, and goes into possession, he cannot afterwards rescind the contract for the defect in the title.
4. It is competent for the vendor to prove knowledge in the vendee of a defect in the title when the contract was made, as an excuse for not making the title at the time stipulated. Such proof does not vary the contract of the parties, though it may excuse its literal performance.
5. A sale of land by three Commissioners, made by order of the Orphans' Court, is valid under the act of 1822.
6. Where a mistake is made in the description of lands in a deed, which the party offers to rectify, there is no ground for the interposition of Chancery to correct the mistake.

Error to the Chancery Court of Sumter.

The bill was filed by the defendant in error to rescind a contract entered into for the exchange of lands. The material allegations of the bill are, that on the 29th day of January, 1841, the parties entered into a written agreement for the exchange of lands. That the complainants agreed to convey certain lands, lying in Sumter county, in exchange for two tracts, lying in Clarke county. That the complainants executed their part of the contract by conveying to Beck by deed the lands in Sumter, and paid the sum of seven hundred dollars. That Beck executed his bond for title to the two tracts lying in Clarke county, with condition to make, within six months, a good and lawful title to complainants, to the lands in Clarke.

The bill further alledges, that Beck, under and by color of the agreement, did by deed, dated 16th February, 1841, convey to Simmons, one of the tracts called the Hamilton tract,

and by deed of the same date, conveyed to Simmons and Kornegay, jointly, the other tract, called the Kirkland tract. That neither of the deeds so made, specified the land district, county or State, in which the lands pretended to be conveyed lie, so that the complainants are unable from the deeds to locate the lands. The bill further alledges, that since the making of the said conveyances by Beck, they have ascertained that he has neither right, title or interest, either in law or equity, to the tract called the Kirkland tract, but that the same belongs to certain minor heirs of whom said Beck is guardian. That as soon as they learned that Beck was unable to make a good title to the Kirkland tract, and as soon after the expiration of six months from the date of said bond, as they could conveniently, they (residing in Clarke county, and Beck in the State of Mississippi,) offered to relinquish possession and to reconvey all the lands pretended to be conveyed by him, if he would reconvey to them the lands he had received from them in exchange; which he refused. The complainants also alledge, that it was material to them to have received a good title, at or before the expiration of the six months.

The answer admits the agreement for the exchange, as stated in the bill, and avers that in pursuance thereof, each party went into possession of the lands received in exchange, and that the complainants knew at the time the agreement was entered into, that the title to the Kirkland tract was in certain minor heirs of whom he was the guardian, and that the contract was made with the express understanding that he was to procure the title so as to be able to convey it by deed. That it was arranged between the parties, that one Hatch, as the mutual agent, should prepare the respective deeds to be executed by each party. That Hatch prepared the deeds, and he executed them in performance of the condition of the bond, and that Hatch as such agent received the deeds for and as satisfying the condition of the bond. And that he repeatedly offered the complainants before the filing of the bill to execute any other deeds they would procure, with more full and certain description.

The answer further states, that after the exchange was made, such proceedings were had in the Orphans' Court of the County of Clarke, where the lands lie, that a sale of the lands com-

prising the Kirkland tract, was decreed in conformity with the provisions of law, and a sale thereof duly made on the 11th June, 1842, at which sale, the defendant acting for the interest and benefit of his wards became the purchaser, which sale was confirmed by the Court on the 13th June, 1842, and a title decreed to be made to him as the purchaser. That the commissioners did convey the land to him on the same day, and that he is now ready and willing to make the complainants a sufficient deed.

The answer admits the offer to rescind the contract, and his refusal, but insists that the complainants have had uninterrupted and quiet possession of the land from the time they were let into the possession. Several witnesses were examined, but it is not necessary to state it here, as it is adverted to in the opinion of the Court.

The Chancellor at the hearing, considering that testimony could not be adduced to vary the written contract of the parties, by showing that the complainants were aware of the condition of the title when the exchange was made, and also considering that the defendant had been guilty of unreasonable delay in procuring the title, decreed a rescission of the contract. This is now assigned for error in this Court.

Bliss & Baldwin, for the plaintiff in error, made the following points:

The rescission of a contract is in the sound discretion of the Court under all the circumstances of the case. [2 Story's Eq. 4; 3 Cowen, 446; 2 Stewart, 370.]

Time is not of the essence of the contract. [2 Story's Eq. 85, 88; Litt. S. C. 115; 3 Peters, 210; 5 Howard, 686; 5 Cranch, 262; 6 Wheaton, 528.]

It is sufficient if the title is acquired after the day and before the decree. [Sug. on Ven. 365; 1 Peters, 465; 5th Howard, 680; Sug. on Ven. 370.]

When defects are known, the purchaser cannot have relief, especially if in possession. And when the purchaser enters into or proceeds in a treaty after he is acquainted with the defects in the title, and knows that the vendor's ability to make a good title depends on the defect being cured, he will be held to his bargain, although the time has expired and considerable

further time may be required to make a good title. [Sug. on Ven. 370; 5th Howard, 279; 3 Marsh, 335; 3 J. J. M. 583; Ib. 701; 1 Johns. C. R. 218; 2 Ib. 519; 7th Monroe, 202; 3 A. K. M, 288; 13 S. & R. 386; 5 Litt. S. C. 229; 2 Wheaton, 13; 5 S. & R. 204; 1 Fon. Eq. 288, in notes.]

Equity will not relieve after acceptance of, and where there is no fraud, for defects in the title known when the deed was received, especially if the purchaser is let into possession under the deed. [3 A. K. M. 334; Ib. 288; 5 Conn. 538; 5 Monroe, 439; 6 Ib. 230; 2 Edwards, 37; 3 J. J. M. 583, 701; 5 Howard, 284, 543.]

The complainant was bound to prepare a deed if he wished a more perfect one. [5 S. & P. 450.]

A Court of Chancery requires stronger reasons for setting aside an agreement, or delivering it up to be cancelled, than would be required to refuse a specific performance. [3 Cowen, 445, 530; 11th Peters, 248.]

That the proceedings of the Orphans' Court were regular. [See Clay's Dig. 224, § 16, 17, 19.]

Salle, contra. If the complainants have not waived time as essential, this Court cannot do it. Neither a Court of equity or law can vary mens' wills or agreements. [Fonb. 290; 3 Black. 435; Days, 272; Con. U. S. art. 1, § 10; 7th Vesey, 264; 6 Wheaton, 534; 1 Johns. Ch. 370; 4 Vesey, 686; 4 Peters, 329; 4 Cond. Eng. Ch. 432; 5 Cranch, 276; 7th Vesey, 202; 14th Peters, 173; 11 Johns. 525, 584; 13 Vesey, 224; 1 Madd. C. R. 415; 5 Cranch, 278; 9 Ib. 489.]

If Beck has not a good title to both tracts of land, his contract being entire, he would not be entitled to a specific performance. His title to the Kirkland tract was not good, for the Court appointed only three commissioners, where it should have appointed five. [9th John. 455; 5 Cranch, 262; 2 Wheaton, 299; Coke Litt. 215; b. Pothier on Ob. 110; 1 Madd. 430; 4 Cranch, 93; 2 Coke Litt. 434; 2 Johns, 109; 2 Cranch, 166; 6th Porter, 232; 9 Cranch, 65; 6 Wheaton, 579; Ib. 125.]

If he has a good title he cannot avail himself of it by his answer. The proceedings before the Orphans' Court is new matter, not responsive to any allegation or statement in the

bill, and is an attempt to make an answer subserve the purposes of a cross bill. [5th Pet. 276; 1 V. & B. 524, 377; 6th Con. Eng. C. 40; 11th Peters, 249; 7 Ib. 274; 10 Ib. 209; 3 Swanston, 60; 3 Stewart, 237.]

The testimony adduced by the defendant is of loose, vague conversations before the contract was entered into, and were extinguished by it, and therefore inadmissible. [1 Johns. C. 273.] The testimony of Hatch is utterly incredible.

The merits of the case are reduced to a narrow compass, and may be thus stated: 1. Can Beck consistently with the principles of common honesty hold the lands conveyed by the complainants to him, they not having received the stipulated consideration.

2. Have the complainants a plain, adequate and complete remedy at law?—as it is clear they have not, this Court must interfere, or there will be failure of justice.

These propositions the counsel argued at great length, and in support of his views cited the following authorities: 2 Johns. Rep. 613; 9th Cranch, 489; 3 Stewart, 237; 4 Cranch, 136; 6th Wheaton, 534; 13th Vesey, 424; 16 Ib. 271; 3 Monroe, 329; 14 Peters, 32; Coop. Ch. C. 307; 1 Peters, 455; 2 Black. Com. 323; 9th Cowen, 154; 4th Mass. 349; Con. Eng. C. 357; 10th Vesey, 292, 306; 7 Ib. 21; 13 Ib. 581; 6th Peters, 98; 1 Johns. C. R. 517.

ORMOND, J.—The object of the bill is to rescind a contract entered into for the exchange of lands. The case has been argued by the counsel for the defendants in error, by whom the bill was filed, as if it was a proposition by the plaintiff in error to enforce the contract specifically, and he has endeavored to show, that under the circumstances of this case, the Court would not decree a specific performance. It is however well settled, that a Court of Chancery may refuse to rescind a contract, where it would not specifically enforce it. [Jackson v. Ashton, 11 Peters, 248; Mortlock v. Butler, 15th Vesey, 292; Seymour v. Delancey, 3 Cowen, 530.] It will not avail the defendants in error, if they could show that from the delay in this case the plaintiff would not be entitled to a performance of the contract. He is not seeking any thing at the hands of the Court, and the only ques-

tion therefore is, whether he has been guilty of such a violation of a contract, that the other party has the right to rescind it.

The parties agreed in writing, on the 29th January, 1841, upon an exchange of lands, the plaintiff in error agreeing to exchange two tracts of land lying in Clarke county for one belonging to the defendant in Sumter County. The plaintiff in error executed his bond promising to make title to the defendants, to the lands in Clarke county, in six months thereafter. And on the 16th February, 1841, the parties mutually executed to each other title to the lands so exchanged. Both parties went into an immediate possession of the lands exchanged. It appears very clear from the proof, that it was well known at the time of the exchange, that the title to the Kirkland tract was not in the plaintiff in error, but that the land belonged to certain minors of whom the plaintiff was guardian, and that it was expected and understood that he was to cause the land to be sold and procure his title.

It would be contrary to equity and good conscience, to permit one who proceeds so far in a purchase as to obtain possession, with knowledge of a defect in the title, to object afterwards, the want of title as a reason for not complying with his contract. If he knows that the defect can only be obviated by a judicial proceeding, it is impossible to suppose that the time stipulated for the completion of the contract, was considered by him an essential ingredient of the contract, as it could not be known what length of time it might take to obtain the title. The question therefore in such cases is not, whether the party was able to make the title on the day stipulated, but whether there was unreasonable delay in obtaining it. [Seton v. Slade, 7th Vesey, 265; Colton v. Wilson, 3 P. Wms. 190.]

Thus far the case has been considered as if it were an executory contract, but it appears to have been executed by the acceptance of a deed before the expiration of the time for making a complete title. The deed was prepared by one Hatch, acting as the agents of the defendants in error, and was received by him when executed by the plaintiff. It could not be tolerated, that one should purchase lands to which he knew the title was defective, accept a deed and go into the possession and

enjoyment of it, and then rescind the contract for the defect of the title. It was urged in argument that the circumstances surrounding the transaction, were conclusive to show, that Hatch exceeded his authority in taking the deed, and that his principals were not bound by his act. His deposition has been taken, and he states that he was the agent of the defendants in error, for the purpose of procuring the deed to be made, and we can discover nothing unreasonable or improbable in his statement. Nor is it alledged in the bill, that the agent exceeded his authority, but it is admitted that the deed was executed on the day it bears date—that the lands called the Kirkland tract, were so imperfectly described in the deed, that they were unable to locate them, and that since the execution of the deeds they had ascertained that the plaintiffs had neither right or title to the "Kirkland tract," and that as soon afterwards as they conveniently could do so, they offered to return the lands they had received and to rescind the contract, which the plaintiff had refused.

The case made by the bill, is not that the agent received the deed without authority, but that the discovery has since been made, that the plaintiff had no title to the land. The answer positively alledges, that the complainants had full knowledge of the true state of the title when the exchange was made, and the proof shows such to be the fact. This testimony was rejected by the Chancellor, because in his opinion it varied the written contract of the parties. If the case now stood upon the written contract of the parties by which the plaintiff was to make title in six months, it is not perceived that the reception of such testimony would violate the rule in question. It does not in the slightest degree add to or diminish the terms of the contract, but merely establishes the existence of a separate and distinct fact. Whatever influence it might, when established, exert over the contract, it no more alters or impairs it, than would the proof of infancy or any other distinct fact, which might prevent its enforcement or affect its validity. Certainly, however, when the attempt is made to rescind the contract for the defect of title, it is competent for the other party to show, that at and before its execution, the defect was well known. This is in truth the issue tendered by the complainants in their bill, not indeed directly, as it is

not expressly alledged that they were ignorant of the true state of the title when the exchange was made, but indirectly, by the allegation "that as soon as they learned that the said Beck was unable to make a good and lawful title to the Kirkland tract, they offered to redeliver possession, &c., to the said Beck."

If it be conceded that it was competent for the complainants, after the contract was executed, with knowledge on their part, that the title was in a third person, to rescind it, unless the outstanding title was extinguished, it certainly would not be permitted without giving the other party a reasonable time to procure the title. The plaintiff might well have supposed, that as the complainants had his deed with warranty, and as they were in possession of the land, there was no urgent necessity for taking immediate steps to get in the outstanding title. As soon as he was apprised of their dissatisfaction with the title as it thus stood, he appears to have acted with promptitude. It is not expressly alledged in the bill, or amended bill, when the demand of title and offer to rescind were made, but it appears from the answer to have been about the 4th of January, 1842. The title was finally obtained by the plaintiff on the 13th June, 1842, under a sale made by virtue of a decree of the Orphans' Court of Clarke county, and tendered to the complainants. We do not think this an unreasonable delay. As from the nature of the case it was necessary to apply to a Court of justice, the delays consequent upon such an application must be allowed.

The only objection here urged to the validity of title thus obtained, is, that the Orphans' Court appointed but three instead of five commissioners to make sale of the land. The act of 1820, (Clay's Digest, 196, § 22,) did require the appointment of five commissioners to make sale of real estate, when such sale was necessary for the purpose of more equal distribution among the heirs, which was the cause assigned for the sale in this instance; but the act of 1822, (Clay's Dig. 225, § 19,) authorizing the Orphans' Court to order a sale of lands for this purpose, is silent as to the number of commissioners necessary to conduct the sale. It is then left to the discretion of the Court as to the number of the commissioners, and being subsequent in point of time, is, as to this particular a repeal of the former

law. There is not therefore, any weight in this objection, and no other has been brought to our notice.

The alledged omission in the deed is, that it does not state the County, State, or land district in which the lands are situated, so that from the deed it is impossible to locate the lands. There is no allegation that the omission was fraudulent, and it appears from the answer and proof, that the deed was prepared by the agent of the complainants. The correction of mistakes is doubtless an appropriate head of Chancery jurisdiction, but to justify the application to that Court for this purpose, it should appear that the opposite party on application, refuses to make the correction or supply the omission, as was held by this Court in Long & Long v. Brown, 4th Ala. Rep. 622, and in subsequent cases. There must exist a necessity for the interposition of Chancery. Here, it appears, that the plaintiff repeatedly offered to supply the omission: there is therefore, no reason shown for the interposition of a Court of Chancery.

Our conclusion is, that the decree of the Chancellor must be reversed, and a decree be here rendered dismissing the bill.

THE GOVERNOR, USE &c. v. ROBBINS, ET AL.

1. Where a sheriff collects money on a *fieri facias*, and renews his bond before it was demanded of him, or he converts the same, the sureties in the latter bond may be charged with his default in failing to pay over the money, if the evidence shows its conversion after their bond was received, and before they were discharged from the suretyship.

Writ of error to the Circuit Court of Coosa.

This was an action of debt at the suit of the plaintiff in error against the defendants, as the sureties of James C. M. Logan, deceased, in his official bond as sheriff of Coosa.—Among other breaches, it is alledged in the declaration, that the principal in the bond while sheriff, collected money on

fieri facias, at the suit of the real plaintiff, which he had failed and refused to pay over. The cause was tried by a jury on issue joined, but in what form, the record does not inform us. From a bill of exceptions sealed at the instance of the plaintiff, it appears to have been shown, that the sheriff received the money on the *fieri facias*, but previous to the time when the defendants executed the bond now in suit. The demand was not however made upon the sheriff until after the defendant's suretyship commenced.

The Court charged the jury, that if they believed from the evidence, the money received by the sheriff on the *fieri facias* and demanded by the plaintiff, was received before the execution of the bond declared on, then the plaintiff could not recover. A verdict was returned for the defendants and a judgment rendered accordingly.

Morris, for the plaintiff in error, insisted that the bond (as indicated upon its face) was the renewal of one of a previous date. That when a sheriff collected money in virtue of his office, he is presumed to hold it in his hands ready to pay over, until a refusal or conversion is proved. Here the intendment from the evidence, is, that no breach had been committed, until after the defendant's suretyship commenced; and they are chargeable. [Townsend & Gordon v. Everett et al. 4 Ala. Rep. 607.] The mere collection of money does not subject a sheriff to a suit for its recovery; a conversion in fact, or a demand and refusal, are essential to invest the party entitled, with the right of action.

N. Harris and White, for the defendant.

COLLIER, C. J.—All persons elected or appointed to the office of sheriff are required to execute bond with good and sufficient sureties for the performance of their official duties; and these bonds shall be renewed annually if required by the Judge of the County Court. [Clay's Dig. 535, § 4.] By the act of 1822, it is made the duty of the Judge of the County Court, upon application by either of the sureties of any sheriff to require a new bond, with a similar condition to that first given. Upon the execution of such new bond, it is declared, that the surety or sureties making application shall be discharg-

ed from the obligation of the bond previously entered into by them: *Provided*, that such sureties shall not be discharged from any liability previously incurred. [Clay's Dig. 534, § 13, 14.] It is sufficiently shown that the bond on which the action in the present case is brought, was but the renewal of one of an older date, and the question is, which set of the sureties are liable for the default proved. Is it those who were bound for the official acts of the sheriff at the time the money was collected by him, or those who were his sureties when the liability was fixed by a demand and failure to pay.

The act of 1836 gives the remedy by notice and motion against a sheriff and his sureties, whenever the former "shall fail or refuse to pay over any money received by him upon any execution, on the application of the plaintiff or plaintiffs, his, her, or their attorney or agent." [Clay's Dig. 218, § 83.] When the remedy provided for by this statute is pursued, it has been repeatedly held, that a demand must precede its institution. So it has been considered that when an action on the bond, as in this case, has been adopted, the failure to pay, after application duly made to the sheriff, is equally essential to the maintenance of the suit. [McBroom v. Governor, 6 Porter's Rep. 32.] This being the case, it is clear that it is not the mere collection of money upon an execution that gives a right of action, but it is necessary that it should be demanded by the plaintiff, or some one authorized to receive it. True, if it could be shown that the sheriff had appropriated it to his own use, or otherwise converted it, this would be sufficient to dispense with a demand, by proving it to be unnecessary. In fact it would be equivalent to, and a substitute for it.

The undertaking of the sureties, as expressed in the condition of the bond, is sufficiently broad, to show that the jury would have been warranted by the proof in finding a verdict for the defendants. It provides, that if their principal "shall well and truly perform all and singular, the duties of sheriff, as enjoined on him by the laws of this State, and pay over all moneys collected by him by virtue of his office, as required of him by law, then this obligation to be void, &c."

It has been held, that if an execution remain in a sheriff's

hands when his term of office expires, on his reappointment it is his duty to execute it; and his neglect is a breach of his new bond. [State v. Roberts, 7 Hals. Rep. 114.] So his sureties are liable for money received by him on execution after the *bond* is given, though the execution was received by him before that time. [People v. King, 15, Wend. Rep. 623.] And it has been decided that they who were the sureties of the sheriff at the time the liability accrued for money collected, are properly answerable for his default. [People v. Ten Eyck. 13 Wend. Rep. 448; Fitts v. Hawkins, 2 Hawk. Rep. 394.] In South Carolina it has been determined that the additional sureties of a sheriff are liable as well for money collected by him before they executed the bond as afterwards; unless, perhaps, the sheriff and his original sureties were sued to insolvency before the additional bond was executed.—[Treasurers v. Taylor, 2 Bailey Rep. 524.] And in Ohio it has been held, that when a sheriff gives an additional bond, both sets of sureties are liable for his misconduct. [State v. Crook, 7 Ham. Rep. (2d part,) 221. See also The People v. Brush, 6 Wend. Rep. 454; Bartlett v. The Governor, 2 Bibb's Rep. 586.]

In Townsend and Gordon v. Everett, use, &c., 4 Ala. Rep. 607, which was an action by the Judge of the County Court, for the use of the County Treasurer against the predecessor of the latter and his surety in the official bond. The question was, whether the surety of the debt was liable for moneys received by his principal under a previous appointment and while other persons were his sureties. The Court were of opinion that it was not the *receipt* of money by the Treasurer which rendered his surety liable, but the failure to disburse it according to law; that the failure to settle his accounts annually, until after the second bond was executed, was not conclusive to show a misapplication of the moneys previously received.

All reasonable presumptions favorable to a performance of official duty are indulged, and it cannot be inferred from the mere receipt of money on an execution by a sheriff, that he has converted it. If it had been shown previous to the execution of the bond in suit, that the principal of the defendants had appropriated the amount collected by him, then the first

set of sureties only would have been liable. But the proof does not show such to be the predicament of this case; the liability to an action does not appear to have been fixed until after the renewed bond was prosecuted. This being the case, it follows from what has been said, that the Court erred in its charge to the jury; the judgment is consequently reversed and the cause remanded.

BANKS & READY, EXECUTORS OF SIMS, v. WHITEHEAD.

1. In an action of covenant upon a general warranty, the averment that at the sealing and delivery of the deed, one N. had the lawful title, freehold and possession, of the land warranted, and still continues so to have, by reason whereof the grantee is, and always has been unable to recover the possession, shows a sufficient breach of the covenant, and is equivalent to the assertion of a legal ouster.

Writ of error to the Circuit Court of Tuscaloosa County.

Covenant by Whitehead against Banks and Ready, as the executors of Sims, on a deed of bargain and sale, conveying a certain tract of land therein described, with a clause of warranty, in these terms: "And the said party of the first part, for himself, his heirs, executors, and administrators, doth hereby warrant, and will forever defend the title of the above bargained premises to him, [the said party of the second part,] his heirs and assigns forever, from the claims of all and every person or persons whomsoever, as also the claims of the General Government." The declaration contains several counts, all of them setting out a similar breach to that contained in the first, which is as follows: "And the said plaintiff avers that at the time of the making of the said deed, or at any other time, the said Edward Sims was not the owner of the said bargained premises, or any part thereof; but that the lawful freehold, title, and *possession* in the same, at the time of the making,

sealing, and delivering the said deed, was in another person than the said Edward Sims, to wit—that it was in one John Nelson, and *still continues* to be in the said Nelson, who then lawfully claimed and possessed and still continues to claim and possess, by reason whereof the said plaintiff cannot hold, possess or enjoy the said bargained premises, or any part thereof." In one of the counts, after alledging the title, freehold, and possession to be in the said Nelson, the breach concludes, "by reason whereof the said plaintiff is, and always has been unable to obtain possession of said bargained premises." The defendants demurred, and judgment being given for the plaintiff on the demurrer, this is now assigned as error.

L. Clark, with whom was Mr. Peck, for the plaintiff in error, insisted that the assignment of breaches upon the covenant of warranty was insufficient, as no eviction was alledged.

J. Porter, contra, contended that the allegation that the plaintiff was unable to obtain possession in consequence of the outstanding permanent title, was equivalent to a formal allegation of eviction. The same facts, if in evidence, would well warrant a recovery. [Caldwell v. Kirkpatrick, 6 Ala. Rep. 60.]

GOLDTHWAITE, J.—The effect of a general covenant of warranty, was very fully considered in Caldwell v. Kirkpatrick, 6 Ala. Rep. 60.] The question here is as to the necessary averments in a declaration to show a breach of this warranty. The plaintiff alledges, in substance, that at the time of the sealing and delivery of the deed to him, that another person than the grantor had the lawful freehold title, and possession, and still continues so to have; by reason whereof the plaintiff is, and always has been, unable to obtain possession.

The case cited is conclusive to show that proof of these facts is sufficient to constitute a breach of the warranty. To the same effect is Cummings v. Kennedy, 3 Litt. 118. In the case of Crawford's heirs v. Pendleton, the declaration is to the same effect as here, except it is added, as a consequence of the inability to obtain possession, that the plaintiff had been evicted; and the Court refused to arrest the judgment although the supposed defect of the breach was urged as a reason to do so. It

certainly is unnecessary to alledge more than is necessary to be proved in an action like this; and although the strictly formal course would have been to alledge an eviction, we feel constrained to decide that the averments here are equivalent to the assertion of a legal ouster. In doing so, we do not conceive we in any manner trench on the rules which govern this covenant, for under the averments of this declaration, the plaintiff would be held to proof that the possession was in another; and after his grantor's title had been shown, it would also be necessary, in order to sustain the action, to show that it was inferior in legal strength to the title held by the individual in possession.

Judgment affirmed.

LEWIS, ET AL. v. THE INTENDANT AND TOWN COUNCIL OF GAINESVILLE.

1. A license to establish a ferry is the grant of an incorporeal hereditament subject to be revoked if a sufficient bond is not executed within ten days after such requisition is made. It is an interest which may be sold, and will descend to the heir as an incident of the fee.
2. When a transcript from the Commissioners' Court discloses that the Court had jurisdiction over the subject, the time when it held its session can not be inquired into collaterally.
3. If the Commissioners' Court meets at the proper time, it may adjourn to any day before the commencement of the next term, and is not required to adjourn from day to day until that time.

Assumpsit from the Chancery Court of Sumter.

The bill was filed by the plaintiffs in error, and charges that the father of complainants obtained an order from the County Court of Sumter for the establishment of a ferry across the Tombigbee river, at the town of Gainesville, on the 23d of January, 1834. That he proceded at great expense, to excavate the bank and prepare boats, and continued in the use and enjoyment of the franchise until his death; intestate leaving

complainants and others his heirs at law. That the complainants purchased from the other distributees their interest in the ferry, which is evidenced by deeds—complainants granting a a life estate in the profits to two females who are parties complainant to the bill. That the defendants contemplate, and have commenced the erection of a wharf near the ferry which will interfere with and materially impair its value, making it necessary to establish another landing higher up the river, at great expense, and greatly increasing the risk of crossing the river to persons and property. That if the corporation are permitted to proceed with the proposed work the injury to the franchise will be great, if not irreparable. The prayer of the bill is for an injunction, which was granted.

Appended to the bill as an exhibit, are the minutes of the Court of Roads and Revenue of Sumter county, by which the order was granted, and the grant of the ferry. The minutes recite that, "at a Commissioners' Court held on the 10th day of June, 1833, *pursuant to adjournment*, and present, &c."

A motion being made before His honor, the Chancellor, to dissolve the injunction, he allowed the motion upon the ground that the grant of a license to keep a ferry in this State, was a personal franchise, and did not descend to the heirs of the grantee. From this decree an appeal was prayed, and allowed.

Bliss & Baldwin, for plaintiffs in error. A ferry is an incorporeal hereditament, and it is so regarded by the Legislature of this State in connection with the ownership of the soil. [Clay's Dig. 514; 2 Danes Ab. ch. 27, page 683; 2 Rolls Ab. 191; 2 Black Com. 38; 5 Am. Dig. 367; Ferry B.; 13 Eng. Com. Law, 299; 6 B. & C. 703; 2 Hilliard's Ab. 81; 2 Stewart's Rep. 160.]

As such it passes by deed and by descent. [3 Kent's Com. 402, 4th ed.; 3 J. J. M. 668; 2d Ib. 227; 1 Howard, 512.]

As property it will be protected. [2 Peter's Dig. 641; 6 Munford, 308; 15 Mass. 240.]

Possession and quiet enjoyment are sufficient of themselves to secure redress, being evidence of title, and sufficient against a wrong doer. [13 Eng. Com. Law, 299; 2 Saund. P. & E. 189; Adams on Ejectment, 28]

As to the grant, the Court of Roads and Revenue had jurisdiction over the subject, and the Court will not presume that it was not regularly adjourned.

REAVIS & METCALFE, contra. The complainants do not show any right to the ferry, because at the time the grant was made the Court had no power to sit. [Clay's Dig. 149, § 2.] And the record should show affirmatively, that the Court was held at the proper time, and adjourned from day to day, and if not legally held its acts were void, (3 Ala. 670; 9th Wheaton, 541; Peck, 82; 2 Scammon, 227,) and may be collaterally impeached. [6 Wheaton, 119; 6 Porter, 219.]

If the license conferred a right, it was a personal privilege and did not descend to his heirs at law, but terminated with his death. [Clay's Dig. 513, § 26, 27; Ib. 515, § 41; Aik. Dig. 642, § 7; 363, § 27, 30; Hilliard's Ab. 84, § 16; 2 Porter, 296; 6 B. & C. 703; Law. Rep. July, 1842, page, 106; 3 Kent's Com. 3 ed. 420, note a.]

In this State possession alone will not authorize the inference that complainant had a title.

But whether the complainants show sufficient title, the bill is without equity, because the corporation was in the exercise of a lawful authority, unless it be a mischievous case of pressing necessity, (7th Porter, 308) which alone would authorize the interference by injunction. [6th John. C. R. 46.]

ORMOND, J.—At common law, a ferry was an incorporated hereditament, and was consequently capable of alienation, and would pass to the heir by descent. In this State, the whole matter has been regulated by statute; so that we must therefore look thereto to ascertain what rights appertain to the grantee of a ferry.

The act now in force upon this subject, (Clay's Dig. 513, § 36,) authorizes the Commissioners' Court to grant a *license* to any applicant to establish a ferry, toll bridge, or causey—to establish the rate of toll—to require a bond from the applicants in a sum not exceeding fifteen hundred dollars, in the case of a ferry; to keep good and sufficient boats, hands and the banks of the stream in good repair: in the case of a bridge or cau-

sey, that it be well built, and kept in good repair; which bond the Court may at any time, if it deems it necessary, require the applicant to renew, giving him ten days notice, and if he fails to do so, revoke his license. The statute also authorizes an action on the bond at the suit of any one aggrieved.

The 28th section provides, that where two or more persons own lands on the banks where the application is made to estabish a ferry, and the owners on each bank apply for a license, the Court may grant a license to either, at their election. The successful applicant paying such damages as may be assessed upon a writ of *ad quod damnum*. This act was passed in 1836, and was intended as a consolidation of the previous law on the subject with some alterations. The license to establish this ferry was granted in 1834—we should therefore consider this question in reference to the former law, where there is any discrepancy between them.

It cannot be denied that the tenure of the grant of a ferry in this State is somewhat doubtful. The use of the term "license," the requisition of a bond from the licensee, the authority conferred on the Court to require a new bond in its discretion, and the power conferred on it of revoking the license if such new bond is not given, all seem to indicate that the license is a personal privilege. On the other hand, the statute evidently contemplates that the right to establish a ferry shall be secured to the owner of the land on the bank of the stream over which the ferry is to be established. This appears from the 28th section of the last act, but more explicitly from the law which was in force when this ferry was established. [Aik. Dig. 363, § 27.] When the applicant owns the land on one side of the water course only, he has the right to condemn the land on the other side to obtain a landing. But how could the amount of damages be ascertained if the privilege was to last only during the life of the applicant? Again, the power to grant licenses for ferries is put by the last act upon the same footing with bridges and causeys; yet it could scarcely have been considered by the Legislature that any one would build or construct a causey upon the uncertain tenure of having it for the term of their lives only. It is true, that by the act of 1827, (Aik. Dig 364, § 28,) as it respects bridges and causeys, it appears to have been expected that a contract would be

made for a term of years by the Court with the applicant, but that only seems to strengthen the argument, as the same act when treating of ferries, is wholly silent as to the time for which it should be held. It appears, indeed, to have been considered that the owners of the land at the place where the ferry was established, have a right to the license upon the conditions prescribed in the act, and that is the only construction which can be put upon the act—when therefore the land upon which a ferry had been established, descended to the heirs of the licensee, the ferry would pass as an incident of the fee, and for the same reason it might be aliened. Such we believe has been the uniform interpretation of this law in this State, and at this day a very large proportion of all the ferries which have been established are in the hands of heirs and purchasers.

In Ladd v. Chotard, Minor, 366, it was held, that the lessee of a ferry was liable for losses in crossing the river, caused by his neglect, and not the owner of the ferry; and the decision is recognized in Taylor v. Rushing, 2 Stewart, 160; yet this is wholly inconsistent with the idea of its being a personal privilege. The principle objection that the heirs or a purchaser from the grantee would not be liable upon the bond of the licensee, and that the law contemplated that some one should always be bound in a bond for the security of travellers, although certainly entitled to weight, is not insurmountable. The Commissioners' Court has the power at any time it thinks proper, to demand a new bond, and this might as well be exacted from the heir, alienee or lessee of the ferry, as from the licensee.

Upon the whole we are of the opinion, that although the act is somewhat obscure, no other conclusion can be attained than that a "license" to establish a ferry is the grant of an incorporeal hereditament, subject to be revoked by the Commismissioners' Court, if a sufficient bond is not executed within ten days after such requisition is made.

In regard to the certificate of the record of the Commissioners' Court, the Chancellor appears to have considered that because it was a Court of limited jurisdiction, a different rule would prevail as to the effect of the transcript from what would be accorded to a transcript from a Court of general jurisdiction. This is evidently a mistake. As to the time when

the Court is to be held, it is precisely on a footing with the Circuit Court, which must commence its sittings at a particular time, and can sit no longer than it is authorized by law to continue in session.

The transcript discloses that the Court of Roads and Revenue had jurisdiction over the subject, and the time when the Court held its session, can no more be inquired of collaterally, than could the time when the Circuit Court held its session. When it is shown from the record that the Court had jurisdiction, the presumption arises that it had power to sit, unless that fact is controverted in a direct proceeding upon the record. In the case of Cullum v. Casey, 1 Ala. 351, the question came up directly upon error, and we held the decree of the Court void, because there was no authority for the Chancellor to sit when the decree was made; but beyond all question, the decree could not have been impeached collaterally for any cause. Here, as the jurisdiction is shown, the same presumption must arise collaterally as if it were a transcript of the Circuit Court.

It was not necessary to validate the acts of the Commissioners' Court, that it should have adjourned from day to day, down to the time of making this order; if it met at the proper time, an adjournment to any day before the commencement of the next term, would be sufficient, as it is authorized to sit until the business is completed.

From this view it results that the Court erred in the decree made, which is therefore reversed, and the cause remanded for further proceedings.

SHEPPARD, ET AL. v. BUFORD.

1. When a garnishee answers that he has received a notice of the assignment or transfer of the debt in respect to which the garnishment issues, from a person residing without the State, the Court should order publication for six months, before proceeding to consider the validity of the assignment: and if the Court decide that the assignee is properly before it, without publication, or the personal service of notice, the appearance of an attorney subsequently, for the assignee will not cure the irregularity.

2. J. B. the plaintiff in a judgment against E. S. obtained judgment upon garnishment against sundry persons who had become indebted to the latter, by having their accounts due W. P. S. transferred to E. S. in consideration of a note made by W. W., which E. S. assigned to W. P. S: *Held*—that if the plaintiff, prosecuted his garnishments with a knowledge of the circumstances under which E. S. became the proprietor of the accounts due W. P. S., or, if after having acquired such knowledge he attempted to coerce a collection of the judgment against the garnishees, he impliedly admitted the validity of the transaction between E. S. and W. P. S. and could not proceed against W. W. to condemn the sum due upon his note.

Writ of error to the Circuit Court of Barbour.

The defendant in error recovered a judgment against Lore and Edmund Sheppard, and caused the latter to be arrested on a *ca. sa.* who discharged himself by rendering a schedule of his estate and taking the insolvent oath. Wm. Wellborn was summoned as a garnishee upon the supposition that he was indebted to Edmund Sheppard, and answers, that the latter had recovered a judgment against him, but he had been notified that it was transferred to Wm. P. Sheppard, before the service of the garnishment. An original and *alias* notice were issued under the order of the Court, requiring the assignee of the judgment to contest with the plaintiff in execution the validity of the assignment: neither of these notices were served on the assignee, and although it was shown that he resided without this State, the Court adjudged that two returns of *non est inventus* were equivalent to service, and that he was properly in Court. Thereupon the counsel of the assignee excepted. Under the direction of the Court an issue was formed and submitted to the jury. In addition to the foregoing facts, it was proved on the trial, that Wm. P. Sheppard being about to leave the State, transferred to E. Sheppard accounts due him for professional services as a physician, amounting to twenty-four hundred and seventy dollars, in consideration of the assignment of the judgment against Wellborn to him, (W. P. S.) That the plaintiff in execution, before E. Sheppard was arrested on the *ca. sa.*, was informed of the transfer of the note on which the judgment against Wellborn was recovered, and the assignment of the medical accounts as an equivalent. Some few weeks previous to the trial, he caused garnishments to be issued to some of the per-

sons mentioned in the schedule of E. Sheppard, as being indebted to him on the accounts assigned by W. P. S., and had obtained judgment against some of them as the debtors of E. S.

It appeared that the plaintiff was then for the first time informed that the schedule of E. S. embraced any part of the accounts transferred him by W. P. S; and he then proposed to release all right to such accounts, and discharge all judgments in his favor founded thereon, if any, which the Court permitted. *Further*—the plaintiff in execution offered to introduce testimony that the assignment of the judgment by E. S. to W. P. S. was in bad faith; to all which the assignee objected, but his objection was overruled, and he thereupon excepted.

1. The assignee then prayed the Court to charge the jury, that if they believed from the evidence, that the plaintiff with a knowledge of the transaction between E. S. and W. P. S. in respect to the debt due by Wellborn, had recovered judgment against the debtors on the accounts assigned by W. P. and E. S., that would be an affirmance of the transfer of the debt owing by the garnishee, and they must under such circumstances find for the assignee. Which charge the Court gave.

Further—if they should believe from the evidence, that the plaintiff with a knowledge of the transfer of the demand upon Wellborn, by E. S. to W. P. S. had attempted to control the collection of the books of account assigned by the latter to the former, as the effects of E. S. that then he will have affirmed the transfer, and cannot disavow his acts, by relinquishing the right thus acquired against the debtors in those accounts. The Court refused to give this charge, but instructed the jury, that if the plaintiff controlled the debts assigned by W. P. to E. S. without a knowledge that the latter became the proprietor of them, in consideration of the transfer by him of the debt due by Wellborn, he would not be estopped from denying the validity of the transfer: if, however, he had a knowledge of the consideration passing from W. P. to E. S., accepted of and controlled the same, he would be estopped. To all which the assignee excepted; and his bill of exceptions, presenting the legal questions arising upon the foregoing facts has been signed, sealed and certified to this Court. The jury

returned a verdict for the plaintiff in execution, and judgment was rendered thereon.

P. T. Sayre, for the plaintiff in error.
J. Buford, for the defendant.

COLLIER, C. J.—The act of 1840 provides, that when a garnishee answers that he "has received notice of the assignment or transfer of the debt or property in respect to which the garnishment is issued, the Court shall not render judgment against the garnishee, but shall suspend proceedings until the validity of the assignment is litigated. And in order that the question may be tried, it is directed that a notice issue to the party to whom the assignment or transfer is alledged to have been made, which "shall be served at least five days before the matter shall be heard." "If the question shall be determined against the party claiming such debt or property, so alledged to be transferred, then the Court shall render judgment final against the garnishee, reserving to said garnishee, his expenses as is now provided for by law; and also reserving to the said garnishee, and to all the parties contesting said question the right of appeal or writ of error." *Further*—"If two notices shall issue to the party alledged to be the assignee or transferree of any such debt or property, and the same shall not be returned *not found*, then the Court before which said garnishment is pending, shall proceed to render such judgment as is right in the matter, having due regard to the laws regulating assignments, and judicial or original attachments." *Lastly*—"In case the party who shall be alledged to be the assignee or transferree of the debt or property embraced in the garnishee's answer is a nonresident, then the Court shall order publication for six months, before proceeding to consider the question litigated between the parties." [Clay's Dig. 63, § 39, 40, 41; 64, § 45.]

The effect of the provision which authorizes the Court to proceed against the garnishee and assignee, when two notices have been returned not found, is limited by the subsequent section, which requires publication to be made for six months, when the assignee or transferree is a non-resident. In the case at bar, the assignee was a non-resident, and it was not competent for the Court, upon the return of the notices unexe-

cited, to direct an issue to be made up between him and the plaintiff in execution, and thus litigate and determine his rights. This irregularity was not cured by the subsequent appearance of the assignee, by an attorney. This though a voluntary act, could not expurgate an error which coerced the assignee to such a course.

In Butler & Alford v. O'Brien, (5 Ala. Rep. 316,) it was decided that if a creditor receives of his debtor a note, which a third person gave to the latter on the purchase of goods, if the creditor was cognizant of the consideration of the note, when he became its proprietor, or retained it as his own, after he acquired such knowledge; in neither case will he be allowed to show that the sale of the goods was fraudulent, with the view of subjecting them to the payment of his debt. The principle of the case cited, is strikingly applicable to the case before us, and very clearly shows, that if the plaintiff in execution, with a knowledge that E. Sheppard became the proprietor of accounts due by sundry persons, under a transfer by W. P. Sheppard, in consideration of the assignment of a debt due by Wellborn to the former, obtained judgment against the persons by whom those accounts were due, as the debtor of E. S., he cannot be permitted to insist that the assignment of Wellborn's debt was fraudulent. So if he recovered such judgments without a knowledge, that the persons against whom they were rendered, became the debtors of E. S. by assignment of W. P. S. as an equivalent for Wellborn's debt, he should upon being informed thereof, relinquish the judgment, or offer to do so, if he would charge Wellborn as the debtor of E. S.

The first charge given, was such as the assignee prayed, and is unobjectionable in itself. The second charge asked, supposed that a knowledge of the transfer of the demand against Wellborn, although the plaintiff in execution knew nothing of the accounts being transferred as equivalent therefor, would make the garnishment of the persons by whom those accounts were due, or the debtors of E. S., equivalent to a confirmation or approval by the plaintiff in execution of the transaction between E. S. and W. P. S., and estop the plaintiff from showing that it was fraudulent. This instruction was properly refused; because it considered as unimpor-

tant a knowledge of the circumstances under which E. S. became the proprietor of the accounts.

The last charge given was strictly correct, and expressed in terms of marked accuracy, the law as we have laid it down.

But upon the first point raised, we have seen that the Court misapprehended the law, in adjudging that the return of two notices not found, was equivalent to personal service, on a *non-resident* assignee.

The judgment is consequently reversed, and the cause remanded.

THE BRANCH OF THE BANK OF THE STATE OF ALABAMA AT MOBILE v. COLLINS.

1. A director of the Branch Bank at Mobile receiving the compensation provided by law as such director, cannot make a contract with the board for compensation for extra services, whilst he continues a member of the board of directors.
2. An order of the board of directors allowing a compensation of $1,000, each, to to the members of the board, constituting the "Real Estate Committee," is illegal and void.
3. The board of directors may compensate one of their number for services rendered to the Bank previous to his connection with it as one of its directors.
4. Where work was done by other mechanics for the Bank, under the superintendence of one of the board of directors, the board might lawfully direct the compensation to be paid to him for the use of those doing the work.
5. Where money is paid to a director by order of the board, not authorized by law, the Bank may recover it as so much received to its use.

Writ of error to the Circuit Court of Mobile County.

ASSUMPSIT by the Bank to recover certain moneys from Collins, had and received to the use of the Bank.

At the trial, the proof was that this action was brought by order of the Governor, by virtue of a joint resolution of the General Assembly, approved 14th February, 1843.

The defendant was a director of said Bank from the 9th of April, 1842, until February, 1843. He received from the Bank

the full compensation provided by law for a director, and also the sum of 1,000 dollars, as a compensation for his services as a member of the real estate committee, that being a committee appointed by the board of directors of the Bank, during the same period of time, for which he received his pay as a director. He also received from the board of directors several sums of money for work and labor performed for the Bank during the same period; as also for work and labor of mechanics employed and superintended by him. These payments were for the sums, and of the dates, which follow:

30th December, 1842,	934 39
3d January, 1843,	1,000 00
7th January, "	433 11
3d February, "	389 25

The defendant proved that the sum of 934 38-100 dollars, was for work and labor done for the board before the passage of the joint resolution, and before he was a director: the sum of 433 11-000 dollars and 389 25-00 dollars, was for work and labor done by other mechanics, superintended only by him: these sums were paid them by the Bank, and they only passed through his hands. He also offered evidence to prove that the real estate of the Bank required some person to superintend it, to rent, lease, &c.—that a thousand dollars was a reasonable compensation, to the person so employed, and that he was, perhaps, the most competent person in the city, being a master builder. He also offered evidence to prove that all the sums paid to him had been approved by the board of directors, and by them ordered to be paid, but the witness did not know whether there was any written evidence of this upon the minutes of the board.

This was the entire evidence, and the plaintiff requested the Court to charge the jury—

1. That it was not competent to the board of directors to make a contract with one of their own body, for extra compensation in taking care, or in any manner supervising or superintending the interest or the property of the Bank; that the compensation allowed by law to the directors, was in full of services of every kind in supervising, superintending, or otherwise controlling the business and assets of the Bank; and that if the defendant, while a director of the Bank, acted as one

of a committee, and was employed in taking care of, and leasing the real estate belonging to the Bank, the board had no authority to allow, nor the defendant to receive the sum of one thousand dollars as a compensation therefor, and the plaintiff must recover.

2. That to prevent a recovery in this case, it was incumbent on the defendant to show that the sums so received by him were appropriated and ordered to be paid by some resolution or memorandum or the minutes of the board.

3. That if the jury should find that the payments of the said sums of money were made subsequent to the meeting of the General Assembly, on the first Monday in December, 1842, then they were made illegally, and the plaintiff could recover in this form of action.

These instructions were refused, and the refusal is now assigned as error.

Phillips, for the plaintiff in error, insisted that the contract for compensation was entirely void, on the principle that the agent could not contract with himself. Independent of this, the services paid for were such as were within the ordinary duties of a director, and therefore fully compensated by the salary provided by law. [McGehee v. Lindsay, 6 Ala Rep. 16.]

Dargan, with whom was Campbell, for the defendant, argued:

1. That the services rendered in relation to the real estate, were not within the general duties of the defendant as a director, and therefore he could contract for a compensation; or if he could not contract he was entitled to a compensation commensurate with the worth of the services.

2. As to the payments for work and labor there was no pretence that these were unjust. The resolution declaring previous payments illegal could not affect the right.

3. The action is misconceived, inasmuch as it should have been case against such of the directors of the Bank as concurred in making the contract, or the appropriation, if either was illegal, or not within their authority.

GOLDTHWAITE, J.—We shall consider the case presented by the bill of exceptions, 1st—With reference to the money received by the defendant in consequence of the resolution of the board of directors to allow compensation to the members of the real estate committee: 2d—With reference to the money paid him for services performed before his connection with the Bank: And, 3d—in regard to the moneys received from the Bank, and paid out by him to others, performing work and labor for the Bank, under his superintendance.

1. It seems to us that the extra compensation of one thousand dollars, was allowed by the board of directors, and received by the defendant, in direct opposition to positive law. During the whole period that the defendant was a director of the Bank, his compensation was fixed by statute, at seven dollars for each day, he was engaged in the discharge of his duties as such an officer. [Clay's Dig. 109, § 24.] What their duties are, is ascertained by reference to the charter of the Bank: this provides that for its management a certain number of directors shall annually be elected by the General Assembly; and the president and directors, for the time being, are invested with power to appoint and remove the cashier, and such officers and clerks under them, as shall be necessary to execute its business; also to allow them such compensation for their services as shall be reasonable and just. [Ib. 109, § 25.]

Here then, we perceive a compensation as provided by positive enactment is to be paid to each director for his services in the *management* of the Bank. The management of its real estate was as much a duty imposed by the charter upon the directors as any other matter confided to their charge; and there is no pretence for extra compensation for this which will not as well apply to any other duty. But conceding that some services could be performed by a director out of the ordinary course of his duties as such, yet he would be entitled to no compensation for them, so long as his relation with the Bank in that character continued. He cannot, at the same time, be a servant of the directors and a director too. The relation of master and servant in the same individual is incompatible, and cannot exist. It would be found impracticable to secure fidelity in the execution of a trust, if the same person is to perform services with respect to it, and afterwards judge, not only of

the manner in which the services are performed, but also of the compensation to be allowed therefor. It would be impossible, when the director became the servant, to determine that the necessity for his services was not induced by his own acts. Common sense would seem to lead to the conclusion, that such services would be considered as merely gratuitous acts, and and that any compensation to be allowed for them, must depend entirely upon the will of the person for whom they were rendered. Such is the light in which they are considered by law, and no action can be maintained to enforce compensation.

No legal effect can be given to the resolution of the board allowing this extra compensation, because the directors were not authorized to act in reference to the subject matter. They were there for the purpose of managing the concerns of the Bank, not for the purpose of voting themselves or their colleagues compensation; whether for extra, or for ordinary services. The law had already determined what their duties should be, and fixed the amount they should receive. All services beyond those provided for, if indeed any such could be rendered, were either purely gratuitous, or if otherwise, dependent for compensation upon the future action of the Legislature; which stands to the Bank in the relation of the authorized agent of the people of the State, who are the stockholders in these institutions. This necessarily disposes of the first question, and shows that the receipt of the thousand dollars was illegal. The consequence is, that it was money received to the use of the Bank, which may be recovered if this is the proper form of action.

2. The second question, is that which arises upon the payment of money to the defendant, for services performed by him previous to his connection with the Bank as one of its directors. The payment was made on the 30th December, 1842, and the act under which this suit is supposed to warrant the recovery of this item, was approved the 14th of February, of the ensuing year. This act provides for the appointment of commissioners to examine and investigate the expense account of this Bank, and to determine upon the legality of each item of expenditure; and amongst other matters, "that all allowances and appropriations made by the said Branch Bank since,

[the meeting of the Legislature,] are thereby declared illegal;" and the Governor is directed to order suit to be instituted for the recovery of such allowances or appropriations. We apprehend this can only be considered as a declaration of the opinion of the Legislature, that the allowances were not warranted by the existing laws. It is certain, however, that no effect can be given to it by the judiciary, unless under the circumstances attending these appropriations, they were not warranted by the laws in force, when they were made. It will be seen that this item was for work and labor performed by the defendant for the Bank, before he was a director; and it cannot be doubted, we think, that it was the exercise of the proper and ordinary powers of the board to direct its payment. Even if it was otherwise, and the defendant had wrongfully acquired that sum, and the Bank had afterwards sued for it, the defendant would be permitted to retain the amount legally due for services performed under these circumstances, as it is clear that he could maintain a cross action for what he reasonably deserved to have.

3. The other class of items are without any legal ground upon which to rest the claim for recovery. It appears from what was proved in relation to them, that the moneys were paid by the defendant to other persons, for work and labor done by them upon the real estate of the Bank, under the supervision of the defendant; and we must infer, as no attempt was made to prove the contrary, that the payments were reasonable and just. This seems to be entirely within the proper province of the defendant as a director, and it was unimportant whether the payments were made directly to the workmen, or were made to the defendant, to be paid to them. In the latter case, the defendant completely discharged himself when he showed the services performed, and the payment of the money received by him as their agent.

4. It is argued, however, that the action should have been at the suit of the State against the defendant for a breach of duty, instead of by the Bank, for the recovery of the money illegally received. This argument does not seem to rest on a sound basis, for if it was conceded that such an action might be maintained, it does not follow that this is irregular. The sufficient answer to it is, that the defendant has money in his

hands which of right belongs to the Bank, and therefore that institution is well warranted in suing for it.

Our conclusion is, that the judgment of the Circuit Court is erroneous, and therefore it is reversed and remanded.

COLLIER, C. J.—I entirely concur in the conclusions just expressed by my brother GOLDTHWAITE, but as this case is one of more than ordinary interest, and the principles upon which it rest may decide many others, I avail myself of the occasion to subjoin a few remarks.

It may be conceded, that a corporation aggregate, in virtue of its general powers, may contract with persons who are members of it; and the contract is not on this account invalid; the member thus contracting must be regarded as to that contract a stranger, rather than a corporation, Aug. & A. on Cor. 2d ed. 169, 212, and cases there cited; Pope v. Brandon et al. 2 Stew. Rep. 401. But this is the law in respect to private corporations only. In the popular meaning of the term, nearly every corporation is public, inasmuch as they are created for the *public benefit;* but if the whole interest does not belong to the government, or, if the corporation is not created for the administration of political or municipal power, the corporation is private. "A *Bank* for instance may be created by the government for its own uses; but if the stock is owned by private persons, it is a private corporation, although, it is erected by the government, and its objects and operations partake of a public nature." [Aug. & A. on Corpo. 23; Trustees, &c. v. Winston, 5 Stew. & P.'s Rep. 17.] And in respect to the late Bank of the United States, it was said, if its stock belonged exclusively to the government, it would be a public corporation; but inasmuch as there were other owners of the stock, it was held to be a private corporation. [Dartmouth College v. Woodward, 4 Wheat. Rep. 668; 2 Kent's Com. 222. See also Owen et al. v. The Branch Bank at Mobile, 3 Ala. Rep. 258; The Bank of the State v. Gibson's Adm'r. 6 Ala. Rep. 814.] These citations incontestably show, that the State Bank and Branches being the *exclusive* property of the State are public corporations, and that the State is the sole corporator. So, that in the case before us, the question cannot possibly arise, whether a corporation may employ

one of its members as an agent, or enter into any other contract with him.

The second section of the act which created the plaintiff a corporation, expressly provides, that the Legislature shall annually elect a president and directors "for the management of the concerns of the said Branch Bank;" the third section, among other things, declares that, "The president and directors for the time being, shall have power to elect and remove the cashier, and such other officers and clerks under them as shall be necessary to execute the business of the said Branch Bank, and allow them such compensation for their services as shall be reasonable and just." [Clay's Dig. 97.] By the act of 1839, "to compensate the directors of the Bank of the State of Alabama and its several Branches," (Clay's Dig. 109, § 24,) it is enacted, that the directors of the Branch Bank at Mobile shall receive "seven dollars *per diem*, for every day they may be engaged in the discharge of their duties as directors; and it shall be the duty of the cashier, under the superintendence of the president in each Bank, to keep a regular account of the days of service rendered by each director, and transmit the same to the presiding officer of each house of the General Assembly, and the payment of the sums due the different directors shall be provided for by an act of appropriation, by the General Assembly, at every session."

It is said that a person cannot take upon himself incompatible duties and characters at the same time, or become agent in a transaction in which he has an adverse interest or employment. [McGehee v. Lindsay, 6 Ala. Rep. 16.; Story on Ag. 11, 199, 200] So, in general an agent cannot delegate his authority unless the power of substitution is conferred in express terms. [Id. 14, 15, 16, 17; 39.] Agents can only be appointed in the manner prescribed by the statute where it speaks upon the subject; and the directors of a corporation specially empowered by the charter to contract on its behalf, have no power to appoint sub-agents to contract for the corporation, unless such power is expressly given to them. [Ang. & A. on Corpo. 210, 212, 242.] Nor can the directors who are vested with the power of discounting notes and bills, delegate this trust to an agent or agents of the board. [Id. 211; 3 Louisiana Rep. 568; 6 Paige Rep. 497; 12 Mass. Rep. 237.]

The directors of our State Banks are not individually corporators, as has been already shown, and they are not even officially designated in the style of the corporations; the plaintiff is called "The Branch of the Bank of the State of Alabama at Mobile." They are, appropriately speaking, agents of the State, with powers limited by the charter, either expressly or by legal construction. In the language of the act, they are elected "for the management of the concerns of said Branch Bank." As such agents, it is the duty of the directors to exercise a supervision over and to manage as far as necessary, not only the funds and debts due the Bank, but the real estate also. If the performance of this duty makes it necessary to appoint officers extraordinary, the third section of the charter confers the power for that purpose, and authorizes such compensation to be given "as shall be reasonable and just." When then the official machinery of the Bank is insufficient for the management of its interests, should not the directory appoint "other officers and clerks?" Can they devolve upon their own board or some of them, what they may consider *extra duties* and services, and allow additional compensation therefor? Would not such an arrangement be opposed to public policy, as it would withdraw the directors from their appropriate duties, and tempt to prodigality in expending the funds of the Bank, with a view to their own benefit? It is not necessary to answer these questions in the present case, as the conclusion attained, may be supported upon other grounds, quite as conclusive.

The act of 1839, we have seen fixes the salary of the directors at seven dollars *per diem*, for each day they may be engaged in the discharge of their duties as such; and it is not competent for the directory, in despite of the declared will of the Legislature, to make a further appropriation for their *official services*, from the funds committed to their management. In the case before us, it does not appear that the supervision, &c., of the real estate of the corporation, was made an office by the board, or that it was in any manner detached from the ordinary functions of the directors; but it is expressly stated that the "Real Estate Committee," was appointed by the board, and of course the members of that committee were as such directors. So far then, as it respects the one thousand dollars paid for service on this committee, the case when denuded, is this—the

Legislature elected the defendant one of the directors of the plaintiff, having first prescribed his *per diem* compensation, and *in addition to his daily allowance*, the board pay him as one of its members the sum of one thousand dollars, for about ten months—that being the time he was in office. Money thus paid without the authority of law, or any consideration recognized as legal, cannot be retained. The right to recover at the suit of the plaintiff, (the funds of which have been diminished by the payment to the defendant,) is clearly maintainable, both upon reason and authority.

ANDERSON v. RHEA.

1. A forthcoming bond must describe the execution which is thereby superseded with sufficient certainty to enable the Court to determine what execution it was intended to supersede, but a small and unimportant variance will be disregarded.
2. Where a forthcoming bond corresponds with the execution in all respects, except that the *cents* in the judgment are omitted, the variance will not affect the bond.
3. The requisition of the statute that the bond shall be taken in double the amount of the execution, and that the property shall be delivered at twelve o'clock, noon, are directory merely.
4. A variance between the property described in the bond as having been levied on, and the indorsement of the levy on the execution, cannot be taken advantage of by the defendant.
5. The return of a sheriff that the bond is forfeited, may be impeached by proving that the defendant was ready on the day, and at the place named in the bond, to deliver the property. The appropriate mode of doing this is by superseding the execution which issued on the forfeited bond.
6. A discharge of the levy as to part of the property, by the execution of a bond for the trial of the right, after the execution of a forthcoming bond, will not dispense with an offer to deliver the residue of the property.

Error to the Circuit Court of Cherokee.

The plaintiff in error filed her petition to supersede an execution which had issued against her as surety on a forfeited delivery bond. The object of the petition was, to supersede and quash the execution, for various reasons, but principally,

because the sheriff did not return the bond forfeited, until long after the return day of the execution—that she was ready to deliver the property, as to which the bond was supposed to be forfeited, on the day and at the place it was to have been delivered—and because of a variance between the execution and the bond.

The Court refused to quash the bond for the variance; and the plaintiff then asked leave to introduce proof, that the return made by the sheriff that the bond was forfeited, was false and fraudulent, and asked the Court to impannel a jury to try the fact, which the Court refused, and refused to permit the testimony to be introduced, and dismissed the petition. From this judgment this writ is prosecuted, and the plaintiff now assigns for error:

1. The refusal to quash, for the variance between the bond and execution.

2. In refusing to allow a jury to try the facts, and in the trial of the facts by the Court.

3. In refusing to permit the plaintiff to prove the return false and fraudulent.

WALKER, for plaintiff in error, cited Lunsford v. Richardson & O'Neil, 5 Ala. 618, and 7 Mass. 98; 1 Howard, 50; 2 Leigh. 545; 1 Ib. 442; 2 Wash. 189, upon the question of variance.

RICE, contra.

ORMOND, J.—A forthcoming bond must describe the execution which is thereby suspended, with sufficient certainty and accuracy, to enable the Court to determine what execution it was designed to suspend. But we are of opinion, that the same degree of certainty is not necessary, which is required in the description of an instrument in pleading. It will be sufficient, if the Court can with reasonable certainty, conclude that they are the same; a small and unimportant variance will therefore be disregarded.

The variances relied on are, that the execution issued for $267 11 debt, and $13 87½ costs and damages, whilst in the description of the execution in the bond the cents are omitted. We consider the variance immaterial. The execution and

the description of it in the bond, corresponding in all other respects, we cannot doubt that they are the same.

The case relied on from 5th Ala. is entirely unlike this; there the parties were not the same, and there was a difference of about three hundred dollars in the amount of the judgment, between the execution and its recital in the bond.

The requisitions of the statute, that the bond shall be taken in double the amount of the execution, and that it shall be stated that the property shall be delivered at "12 o'clock, noon," are directory merely. That the penalty of the bond was for less than double the amount of the execution, and that the defendant had the whole of the day to deliver the property in, were for her benefit, and she cannot complain of them.

The variance between the property described in the bond as having been levied on and the indorsement of the levy on the execution, cannot be taken advantage of by the defendant. The description of the levy is not a part of the description of the execution. The sheriff is not concluded by the levy returned on the execution, but may amend it to correspond with the truth of the case. The defendant was not bound beyond her undertaking in the bond, and might have discharged herself from the condition, by delivering, or being ready to deliver, on the day and at the place named in it, *twenty-five* head of hogs, although the sheriff returned on the execution that he had levied on *seventy-five* head.

The fact, that a bond was given for a trial of the right of some of the property levied on, and the levy discharged as to other property, after the execution of the bond, did not change or alter the obligation of the defendant to deliver the hogs, as to which the levy had not been discharged, or any bond given to try the right.

It follows from what has been previously stated, that the Court did not err in refusing to quash the bond, but we think the Court committed an error in refusing to permit the defendant to show that the return of the sheriff, that the bond was forfeited, was false.

In ordinary cases, it is true, that the return of a sheriff cannot be impeached collaterally, but we think that those returns of sheriffs, which in so many instances, by our legisla-

tion, have the force and effect of judgments, may be thus impeached, otherwise the party will be subjected to a judgment without a jury trial, and be driven to seek the aid of a Court of Chancery. These statutes are all unconstitutional, unless some mode exists by which the party against whom a judgment has thus been rendered *ex parte* can test its validity; and the cheapest and most expeditious mode of accomplishing this, is by *supersedeas*, as in this case. If the defendant was ready on the day and at the place to deliver the hogs mentioned in the bond, the return was false, and the statute judgment founded on it should be vacated. This we understand from the record, the defendant proposed to prove, and the Court refused her permission to do so.

For this error, the judgment must be reversed and the cause remanded.

BRANCH BANK AT MOBILE v. SCOTT.

1. An appropriation and payment by the board of directors of the Branch Bank at Mobile, to an individual director, for extra services, performed by him in the interior counties of the State, is not warranted by law; and the amount thus paid may be recovered from him by the Bank.

Writ of error to the Circuit Court of Mobile.

GOLDTHWAITE, J.—The case of Mr. Scott is not different in principle from that of Mr. Collins. [*ante* 95.] Mr. Scott was a director for the same year and received an extra allowance of five hundred dollars, for services performed by him as the agent of the Bank, in several of the interior counties during the summer of 1842. These services were proved to be reasonably worth the sum allowed for them, but the appropriation is subject to the same legal objection, that the services were performed while he was a director. In the case of Mr. Collins, we endeavored to show that the board had no authority to direct compensation even for services out of the ordinary

course of the business of director; and that when such were rendered no legal claim for compensation arose; but the individual was thrown on the consideration of the Legislature for compensation. In the present case, it may be proper to add, that the defendant would certainly be entitled to retain his *per diem* allowance, during the period he was engaged in the business of the Bank, if that had not previously been allowed in his general account.

Judgment reversed and cause remanded.

THE BANK OF MOBILE v. MARSTON.

1. Where commercial paper is placed in the hands of a notary for demand and protest, if he has not given notice to the drawer and indorsers, he must inform the holder with all reasonable despatch what he has done; and if he has undertaken to give notice, he must perform this duty in such a manner as not to prejudice the holder's rights.
2. The certificate in the protest of a notary setting forth the demand and refusal of an inland bill, &c., and notice to the drawer and indorsers, is made evidence by statute, yet it is not conclusive; and it is competent for the party to show such a state of facts, as prove that the certificate is untrue.
3. Where the notary certifies that he has given notice of the dishonor of paper to the drawer or indorsers, and the holder in consequence thereof, fails to give it, if the certificate of the notary is false, he will be bound to make good any loss which may result from its falsity.
4. Where the maker of a note who has indemnified his indorser, afterwards shows the note to the latter, telling him that he has paid it, and demanding a release of the indemnity, which is accordingly done; if the note has not been paid, the holder cannot excuse the want of notice to the indorser by showing that he had been indemnified.
5. The measure of damages in an action against a notary for failing to give notice of the dishonor of paper according to his undertaking, must be graduated by the injury sustained by the neglect; in estimating which, the solvency of the party to whom the notice was given, is an important element.

Appeal from the Circuit Court of Mobile.

THIS was an action on the case by the plaintiff in error against the defendant, to recover damages for his neglect to give notice to Thomas G. Newbold, that a promissory note

made by Jeremiah Findley and John Cody, and indorsed by Newbold, Andrews, and Fontaine & Freeman, for the payment of seven hundred and forty-one dollars on the first and fourth of January, 1839, had not been paid at maturity, by the maker. The cause was tried upon an issue of fact, and the jury returned a verdict for the defendant, on which a judgment was rendered.

On the trial, the plaintiff excepted to the ruling of the Court. It is shown by the bill of exceptions, that the plaintiff read the note and indorsements to the jury, also a notarial protest made by the defendant, in which he states, "that the indorsers have had due notice of the demand and non-payment, and protest of said note, by notice in writing, directed by me, as follows: to T. G. Newbold, and left at his office; and for the two last indorsers, and left at the office of Fontaine & Freeman." *Further*—the plaintiff proved that the makers and indorsers were, at the maturity of the note, with the exception of Newbold, insolvent, and still continued so, and Newbold was now insolvent. The record of a suit against Newbold upon his indorsement, was also adduced, in which a judgment was rendered in his favor, on the 24th of December, 1841; the defence of that action was as Newbold testified, the want of due notice of non-payment by the makers.

The plaintiff also proved by Newbold, that at the time of the protest he had no office in the city of Mobile, or elsewhere, and that he never received notice. It was also shown by the same witness, that the note in question was one of three, payable in one, two, and three years; that the makers had transferred him indemnity for his indorsement. At the maturity of the third note it was presented to him by the makers, who stated that all the notes were paid, and required him to release his indemnity; which he did. The first intimation that he afterwards had, that he was looked to for the payment of the note, was about the time he was sued on his indorsement.

It was further shown that the uniform custom and usage in Mobile, required that a notary to whom a negotiable note was given for demand and protest, should himself give notice of the non-payment to the indorsers. The defendant offered no evidence, and the Court charged the jury that the plaintiff was not entitled to recover.

P. Phillips, for the appellant, cited The Bank of Mobile v. Huggins, 3 Ala. Rep. 213; Story on Agency, 197; 6 Shepley's Rep. 108.

Blount, for the appellee, cited 3 Johns. Rep. 427; 10 Id. 38; 9 Id. 141; Story on bills, 359; 1 Ala. Rep. N. S. 565; 3 Ala. Rep. 213; 2 Johns. Rep. 205, 327; 7 Id. 385.

COLLIER, C. J.—The charge to the jury impliedly admits the truth of all the evidence adduced, and the inferences legitimately deducible therefrom, and affirms, that the plaintiff is not entitled to recover. It is needless to consider at large the duties of a notary, in respect to giving notice to the drawer or indorsers of commercial paper, placed in his hands for demand and protest. We think it clear that he should at least inform the holder what he has done, with all reasonble dispatch, if he has not given notice; and if he undertakes to perform this service, he must perform it in such manner as not to prejudice the holder's rights. In the present case it was shown to have been the usage in Mobile, for notaries to give notice to the indorsers of the non-payment of paper, such as that in question; further—that the defendant did actually attempt to give such notice. This being the case, he should have given it in such manner that it would have been effectual in law. The certification in the protest upon this point is made evidence by statute, yet it is not conclusive; but it is competent for an indorser to prove that he could not have received a personal notice, because he was elsewhere and had no agent: he may also show that he had no place of business at which a notice could have been left, or any other fact which negatives the recital in the protest.

Even if the holder was furnished by the notary with the papers, so as to have enabled him to have given due notice to the proper parties, the affirmation of the protest that the indorsers had been notified, showed this to have been unnecessary, if true. And he was authorized to give all credence to the recital, and look to the notary to repair any injury that might result from its falsity.

In Stephenson v. Primrose, 8 Porter's Rep. 166, we state, as a deduction from the authorities, that when an indorser, before the maturity of the note, obtains an assignment of *all* the

maker's estate, or of so much as is necessary to indemnify him against the consequences of his indorsement, the maker's default will fix the indorser's liability, without the previous steps of a demand and notice. [See also Story on bills, 359.] We will not stop to inquire, whether the indemnity about which the witness spoke was ample, or covered all the property of the makers of the note; or rather, whether this was not one of the inquiries of fact that should have been submitted to the solution of the jury. When the makers of the note showed it to the indorser, stating that it had been paid, and asking that the indemnity might be released, the latter might very well have inferred the truth of the statement from the possession of the paper, and complied with their request. Under such circumstances the holders of the note could not claim as against the indorser, any benefit from the indemnity, or set it up as an excuse for the omission to give notice of non-payment. And it is not a legal conclusion, from the possession of the note that the makers had paid it, and again put it in circulation in fraud of the indorser's rights.

Whether a judgment against Newbold would have resulted in the collection of the amount of the note, is a matter which could not determine the plaintiff's right to a verdict in the case at bar. If he was insolvent the plaintiff would be entitled to nominal damages, if the facts established a breach of duty on the part of the defendant; beyond this, the recovery would have been graduated by the loss which the defendant's neglect occasioned. In estimating which, the solvency of the indorser would of course be a material inquiry.

It is unnecessary to consider this case at greater length.—The Bank of Mobile v. Huggins, 2 Ala. Rep. 206, lays down principles, which, if observed, will most probably lead to a correct decision upon another trial. We have only to add, that the judgment of the Circuit Court is reversed, and the cause remanded.

WOODWARD, ADM'R, v. SMITH.

1. A father sells a tract of land, the title to which is in the name of his son; the son, after some conversation, aside, with his father, makes a conveyance to the purchaser, who executes notes to the father for the price agreed on. The son, after these notes are paid, sues his father's administrator to recover the sum thus received for the tract of land so sold and conveyed: *Held*—that this was not a contract or agreement for the sale of lands within the statute of frauds.

Writ of error to the Circuit Court of Pickens.

ASSUMPSIT by Smith against Woodward, as administrator of Joseph Smith, for money had and received.

It appeared at the trial that Joseph Smith, the defendant's intestate, in his lifetime, sold to one Owen, three eighty acre tracts of land, for 18 37-100 dollars per acre. When the conveyance of these lands was to be made, the purchaser discovered that the title to one of the tracts was in the name of the plaintiff, who was a son of the vendor. The purchaser was unwilling to accept a deed from the vendor, and insisted on having one from the plaintiff. After some conversation aside with his father, the son executed a deed to the purchaser for this tract of land, and the notes for the entire purchase money were then executed and delivered by the purchaser to the father, without any objection on the part of the son; the father remarked at the time, that John ought to let him have the notes, as he had debts to pay, and the main part of all he had was for his son any how. With a portion of the notes so received the father paid his debts; another portion he collected in cash; and the remainder of 600 dollars was paid to his administrator. There was no note or memorandum in writing executed by the father to the son, with reference to the land in question.

On this state of proof, the defendant asked the Court to instruct the jury that they could not find for the plaintiff, unless there was a promise or agreement, or some memorandum in writing, binding the defendant's intestate to pay the plaintiff for the land. This was refused, and the defendant having excepted, now assigns this refusal as error.

L. Clark, for the plaintiff in error.

J. B. Clarke, contra—cited Miller v. Irwin, 1 Dev. & Bat. 103; Cody v. Caldwell, 5 Day, 16; 9 Mass 510; 2 Ib. 540; 17 Ib. 258; Lewis v. Grimes, 7 J. J. Marsh, 336; 6 Dana, 337; Bliss v. Thompson, 4 Mass. 488.

GOLDTHWAITE, J.—We do not see upon what reason this case can be brought within the statute of frauds as a contract or agreement for the sale of lands. The son at the request of the father, conveys land to a third person, to whom the father had sold it, and consents that he may receive the notes given for the price. Under these circumstances, there must have been either a trust on the land for the benefit of the father or a gift of it by the son; or the father must have received the money on the notes to the use of the son. It is supposed, however that no assumpsit can be raised, inasmuch as the promise is not in writing; but in Lamar v. Price, 2 Bing. 437, it was held, where an oral bargain for the purchase of land had been transferred to a third person, and a conveyance afterwards made to his nominee, that he was liable to pay the sum agreed on, although the original contract, not being in writing, could not be enforced. In that case the contract with the third person was in writing, but this fact is of no importance, as the contract was executed by the conveyance of the land to his nominee. In Griffith v. Young, 12 East. 513, a tenant agreed with his landlady, that if she would accept another for her tenant in his place, (he being restrained from assigning the lease without her consent,) he would pay her a certain sum of money out of a larger sum which he was to receive; and it was held he was liable on this agreement, although it was not in writing, the contract having been executed. Indeed we cannot perceive any sound distinction between a conveyance to the bargainee of land, and a conveyance to one at his nomination; and we have heretofore held that assumpsit might be brought when a deed had been executed and accepted, although the contract of purchase was oral only; and such is the settled law in Kinlock & Lewis v. Graves, 7 J. J. Marsh 336.

We are informed only of one of the questions before the

jury, but they probably inferred a promise to pay as soon as the proceeds of the notes given for the land should be realized We are not authorized to disturb the verdict on the exception taken. Judgment affirmed.

CLIFTON, ET AL. v. COOK.

1. When an election is ordered by the Legislature to ascertain the sense of the people of the county, as to the site of the court house, and an election is had, it ought not to be disturbed because of some irregularity, or informality in the mode of holding it, if a majority of the legal votes are cast in favor of a particular place.

Error to the Circuit Court of Cherokee.

Petition for a *mandamus*.

RICE, for the plaintiff in error.
WALKER & WHITE, contra.

ORMOND, J.—We have not considered it necessary to enter upon the inquiry, whether there may not have occurred some slight irregularity in the election held for the county site, between the rival places of "Centre" and "Cedar Bluff," because it does not appear from the petition that "Centre" has received a majority of the legal votes of the county. The objections to the election, are, that the returns of the county precincts were made to the sheriff instead of being made to the managers of the court house, and were not sealed up, and that the sheriff appointed the managers at some of the precincts.

The design of the act under which this election was made was, to ascertain the sense of the people of the county as to the location of the county site, and if the election was fairly conducted, it ought not to be disturbed because a manager was appointed by the sheriff instead of the Judge of the County Court and Commissioners of Roads and Revenue. It is not alledged in the petition, that the return made by the sheriff

was not authorized by the vote which was cast, and even if it were conceded that the reference in the statute, authorizing this election, was to the mode in which the general State elections are conducted, and are adoptions of the rules prescribed for general elections, yet we apprehend that the true question always in a contested election is, which party has received the highest number of legal votes. We do not therefore consider it necessary to inquire whether there has not been some irregularity in the mode of holding the election, nor whether the petitioners have shown such an interest in the question, as will authorize them to petition for a mandamus. The merits of the question appear to have been settled in the election by the people of Cherokee, and no mandamus can issue upon an objection which relates to form merely.

Let the judgment of the County Court be affirmed.

LAND v. HOPKINS.

1. Not only a perfect, but an inchoate legal title to lands, may be levied on and sold under a *fieri facias*.
2. The defendant in execution was in possession of a lot under a deed executed on the 1st of April, 1837, by J. C. M., as treasurer of the commissioners appointed to sell lots in the town of Livingston, with covenant of warranty; in December, 1838, the defendant in execution bargained and sold the lot, to a third person, to whom he delivered the possession. In June, 1838, the plaintiff obtained his judgment—on the 5th of August, 1839, the lot in question was sold under a *fieri facias* issued thereon, and in October, 1840, a patent was issued by the United States to the commissioners, &c., for the tract of land of which the lot was a part: *Held*—that the judgment operated a lien upon the lot before the sale by the defendant in execution, and that the vendee of the latter might be dispossessed by action at the suit of the purchaser at the sheriff's sale.

Writ of error to the Circuit Court of Sumter.

THIS was an action of trespass at the suit of the defendant in error against the plaintiff, brought as well to try titles to a lot in the town of Livingston, particularly described in the declaration, as to recover damages for its occupancy. The de-

fendant pleaded "not guilty," and issue being joined thereon, the cause was submitted to a jury, who returned a verdict for the plaintiff, and judgment was thereupon rendered.

From a bill of exceptions sealed at the instance of the defendant, it appears that the plaintiff read to the jury the record of a judgment of the Circuit Court of Sumter, rendered on the 5th of October, 1837, and a certificate of its affirmance by the Supreme Court, on the 28th of June, 1838, in favor of Isaac C. Snedicor against Cornelius Rain, Wm. Johnson and Cleaveland Robb. He also gave in evidence several executions issued from the same Circuit Court, one of which tested of 15th April, 1839, was levied by the sheriff on the same day, on the premises in question. In virtue of the *fieri facias* and levy, the premises were duly sold on the 5th of August, 1839, to the plaintiff, to whom the sheriff's deed therefor was delivered on the 14th of the same month. This deed, together with one to J. C. McAlpin, as treasurer of the commissioners, appointed to sell lots in the town of Livingston, bearing date the 1st day of April, 1837, with covenant of warranty, to Robb, also a title bond from Robb to the defendant, dated the 11th of December, 1838—all for the premises in controversy, were read to the jury. The defendant was admitted at the institution of this suit to be in possession of the lots sued for, under the title bond. It was also proved that the title to the premises never passed from the United States, until October, 1840, when it vested in the commissioners.

The Court charged the jury that if they believed the facts set forth to be true, the plaintiff had shown sufficient title to recover in this action.

L. Clark, with whom was J. Hair, for the plaintiff in error, insisted that Land had not such a title as was the subject of levy and sale under a *fieri facias*. [5 Porter's Rep. 327, 433, 249; 1 Johns. Ch. Rep. 55–6; 4 Cow. Rep. 601–2; 4 Kent's Com. 98.]

R. H. Smith, for the defendant, made the following points: 1. That Robb had such a title as was the subject of execution and sale. The land of which the lot in dispute is a part, was reserved from sale by the United States, as a county seat, and

the county had the right of entry. As for McAlpin's deed, his conveyance of lots as treasurer, by a special act passed in 1840-1, were declared valid. Robb had the color of title, and that acquired by the commissioners vested in him, in virtue of this covenant of warranty in McAlpin's deed. This, coupled with the possession, gave him an interest that was subject to execution. [9 Cowen Rep. 192; 4 Ala. Rep. 584.]

2. Land cannot set up the outstanding title to defeat the plaintiff's action. [7 Cow. Rep. 643-4; 3 Id. 89; 2 Caine's Rep. 216; 14 Johns. Rep. 224; 3 Id. 499; 4 Id. 210; 7 Id. 158; 6 Wend. Rep. 228; 12 Id. 57; 9 Cow. Rep. 223; Adams on Eject. 57, note; 3 Peter's Rep. 48, 224; 7 Wend. Rep. 401; 6 Wend. Rep. 666; 12 Id. 105.]

COLLIER, C. J.—In Goodlet v. Smithson, 5 Porter's Rep. 249, we determined, that by the act of entry and payment of the purchase money, the purchasers of lands from the United States acquired an inchoate legal title, which is the subject of levy and sale under execution. And in Rhea, Conner & Co. v. Hughes, 1 Ala. Rep. N. S. 219, we held, that the mere possession and improvement of land belonging to the United States, however valuable, is not the subject of levy under execution. But it was there said, that the question whether the possession under a contract could be reached by *fieri facias*, depended upon a different principle.

The act of 1812, "regulating the mode of collecting money by execution," enacts, that "hereafter, lands, tenements and hereditaments shall be subject to the payment of all judgments or decrees, of any Court of record within this State, and the clerk of such Court shall frame the execution accordingly; and in all cases, the sheriff or other officer levying such execution on real estate, shall give at least thirty days notice of the time of such sale, &c."

In Jackson v. Parker, 9 Cow. Rep. 73, it appears that by a statute of New York, the lands, tenements and real estate of every defendant in a judgment, obtained in a Court of record, is subject to levy and sale; the question was, whether one who was in possession of land under a contract of purchase, had a real estate in the land within the statute, which was bound by a judgment of a Court of record. The Court said the term

estate, is very comprehensive, and signifies the quantity of interest which a person has, from absolute ownership, down to naked possession. *Real estate* includes every possible interest in lands, except a mere chattel interest. *Further*—the possession of lands, is an interest which may be sold on an execution against the possessor—(3 Caine's Rep. 189; 16 Johns. Rep. 192)—and in an action against such possessor he cannot show title in another. The estate which is the subject of a sale on execution must be a legal estate. The Court also cite Jackson v. Scott, 18 Johns. Rep. 94; in which it was decided, that a person in possession of land, under a contract for the purchase and sale of it, has an interest in the land, which may be sold on execution. [See also, Bogart v. Perry, et al. 1 Johns. Ch. Rep. 52, S. C.; 17 Johns. Rep. 351; Jackson v. Town, 4 Cow. Rep. 602; Jackson v. Tuttle, 9 Cow. Rep. 233; Jackson v. Hagaman, 1 Wend. Rep. 502.]

Where one claims as a purchaser, at a sale under execution, it is only necessary to show that there was a legal title subsisting in the defendant at the time the judgment was rendered, without producing a regular chain of title from the United States to the purchaser. [Brock, et al. v. Yongue, et al. 4 Ala. Rep. 584.]

The act of 1820, provides that "no other than the legal title to land or other real estate, shall hereafter be sold or conveyed by virtue of any execution:" *Further*—"The equitable title or claim to land, or other real estate, shall hereafter be liable to the payment of debts by suit in Chancery, and not otherwise, &c." Under this statute it has been held, that the occupant of land with an equitable title, cannot be regarded as having a distinct and independent possession, which may be levied on, but his possession is so intimately connected with the title, that it cannot be sold under execution, so as to transfer an interest to the purchaser. [Doe, ex dem. Davis v. McKinney & McKinney, 5 Ala. Rep. 719.]

Let this view of the law suffice to show the principles applicable to the present case, so far as it is necessary to consider it. Our statute of 1812, is quite as broad in its terms as that of New York, to which we have referred, and but for the limitation prescribed by the act of 1820, would authorize a construction quite as enlarged and liberal. The restriction impos-

ed, applies only where the defendant has a mere equitable title. Here, Robb, a defendant in execution, cannot be regarded as between himself and the plaintiff, as the mere occupant of the government land; nor can his possession be treated by the defendant as an occupancy by permission of the United States. His title, whatever might be its extent, was clearly legal; when it was shown that he was in possession under a deed professing to convey the fee simple title—the plaintiff would not be required to show that the grantor in that deed had an interest to convey, nor will the grantee of Robb be permitted to show that the title was in a third person, for the purpose of defeating the plaintiff's action. It is unimportant whether Robb had a perfect legal title or not; his interest was a *tenement*, or *estate*, either of which might be sold. The act of 1812, is express upon this point, and its meaning thus far, is satisfactorily explained by the case of Jackson v. Parker, ut supra.

The deed of McAlpin could not be treated as merely void—possession passed to the grantee therein, and if not obligatory upon the commissioners, would in virtue of the covenant of warranty therein, draw to him such title as McAlpin would afterwards acquire: and if binding upon the commissioners would have the same effect upon their after acquired title.

A *fieri facias* binds the real estate of the debtor from the rendition of the judgment. [Clay's Dig. 205, § 17; Morris v. Ellis, 3 Ala. Rep. 560.] This being the case, the sale from Robb to the defendant could not have the effect to divest the lien of the execution under which the plaintiff claims.

The purchaser at a sale under execution acquires the title of the defendant at the time of the purchase, unaffected by any assignment made by him subsequent to the judgment. But, whether such purchaser could claim the perfection of his title, in virtue of covenants in the deed, to the defendant in execution, where the vendor of the latter has acquired the outstanding title, is a question, which as it is not necessary to be decided, we purposely decline to consider.

It results from what has been said, that the charge of the Circuit Judge is correct, and the judgment is consequently affirmed.

LOWRY'S ADMR'S, v. THE WESTERN BANK OF GEORGIA.

1. A note payable at the Western Bank of Georgia is indorsed in Alabama; the indorsement is governed by the laws of Alabama, although the note and indorsement were made with the intention that it should be negotiated in Georgia, and with a view to be performed there.
2. When the liability of an indorser has not been fixed by notice, the fact that he has taken an indemnity from the maker, after the maturity of the note, will not have the effect to charge him on the indorsement.

Writ of error to the Circuit Court of Cherokee County.

ASSUMPSIT by the Western Bank of Georgia against John Lowry, as the indorser of a note made by one Bennett, payable at the Western Bank of Georgia. The first count is in the usual form upon the indorsement, and avers demand of payment and notice of non-payment to the indorser; the sixth count is the common one upon an account stated.

The second count is on the indorsement, and contains no averment of notice to the defendant; the note is described as made and indorsed in the State of Georgia, and it is alledged that by the charter of the Bank, it is enacted that no notice or protest shall be necessary to charge any indorser or maker of any note or obligation due said Bank; and that no proof of notice, demand, or protest shall be necessary or required on any trial to authorize a recovery.

The third and fourth counts have no averment of notice to the defendant of the non-payment of the note by the maker, and do not set out any place where the note or indorsement was made, but aver, that after the maturity of the note, and after the default of the maker, the defendant procured him to execute a deed of trust, conveying property of greater value than the amount of the note, for indemnification against the liability on account of said indorsement.

The fifth count has no averment of notice, and states the indorsement as made in Alabama, but alledges that the note was made and indorsed with a view to its negotiation in Rome, in Georgia, and to its becoming the property of the

plaintiff by its negotiation at that place, and to be performed with a view to the laws of Georgia. The charter of the Bank is set out the same as the second count. The defendant demurred to said count of the declaration, and his demurrer being overruled pleaded to issue.

At the trial the plaintiff gave in evidence two deeds of trust, executed by Barnett to a trustee, and conveying property for the purpose of indemnifying the defendant against his liability as indorser of the note sued on. The defendant was a party signing the deed, and the value of the property conveyed by it was in evidence.

The Court charged the jury, that although the indorsement was made in this State, and there was no proof of demand and notice to Lowry, yet if he took an indemnity which was full and sufficient to protect him from loss, that superseded the necessity of protest, demand and notice, and the plaintiff was entitled to recover if such was the fact. That, although Lowry's liability was extinguished by a failure on the part of the Bank to give notice of the non-payment, yet if he took a full and sufficient indemnity from the maker of the note, it mattered not at what time the indemnity was taken, the liability was thereby revived, and the plaintiff, in such event entitled to recover.

The defendant excepted to this charge, and it is now assigned as error, as is also the judgment, upon the demurrer be the four last special counts of the declaration.

Hopkins & Hinton, for the plaintiffs in error, made the following points:

1. The counts demurred to show no cause of action, and should have been overruled. [Givans & Herndon v. Western Bank of Georgia, 3 Ala. Rep. 397; Stephenson v. Primrose, 8 Porter, 155.]

2. The Court erred in the charge, as a subsequent indemnity cannot revive a liability once gone. [Chitty on bills, 359, 476; Mechanics' Bank v. Griswold, 7 Wend. 165; Bard v. Farham, 5 Mass. 170; Tower v. Durell, 9 Ib. 332; Prentiss v. Danielson, 5 Conn. 175; Stephenson v. Primrose, 8 Porter, 155; Wredman v. Eastman, 10 N. H. 363.]

RICE and WHITE, contra, argued:

1. Contracts are construed and governed by the law of the place where they are to be performed. [Dunn v. Clement, 2 Ala. Rep. 392; Givans v. Western Bank of Georgia, 2 Ib. 397; Hanrick v. Andrews, 9 Porter, 9.]

2. Full indemnity to an indorser precludes him from urging that he is not responsible, because of an omission of demand and notice. [Chilton v. Robbins, 4 Ala. Rep. 224; Bard v. Farnham, 5 Mass. 170; 9 Ib. 332.]

GOLDTHWAITE, J.—Two principal questions have been raised in this case. The first is, whether the charter of the Bank can affect the indorsement made in Alabama, so as to render a demand of payment of the maker, and notice to the indorser unnecessary to fix his liability. The other is, whether a full indemnity taken by an indorser from the maker, subsequent to the dishonor of the note, will have the effect to revive the liability of the latter, when he is not charged by notice. We shall consider each in its turn.

1. The counsel for the plaintiff in error do not deny the general principle, that the indorser is chargeable according to the law of the place of indorsement, but they insist here, that as this note was made and indorsed with a view to its negotiation in Georgia, and was to be performed with a view to the laws of that State, (as averred in the last count of the declaration,) these must prevail, and furnish the rules by which the liability of the indorser, as well as the maker, is to be ascertained and governed. We think this argument is not sustained by any principle known to the law. Every indorser of a bill drawn in this State, upon another, or upon a foreign country, enters into the contract with a view to the negotiation and payment of the bill there; but this does not in any manner bring his indorsement within the influence of laws which are local to the place where the bill is payable. The averments, of the intention of the parties, which are introduced into this count of the declaration, are no other, or different from those which are presumed in every case of indorsement of a negotiable instrument. It may then be considered as if these averments were entirely omitted; if such was the form of the count, the indorsement would be within the precise principle

conceded by the counsel, and universally held by all writers upon commercial law. [Story on bills, § 397, 399, 177, n. 2; Chitty on bills, 661, 881.]

2. With respect to the supposed revival of the indorser's liability by his acceptance of, or procuring indemnity from the maker, the principal authorities relied on by the counsel for the defendant in error, are Bard v. Farnham, 5 Mass. 170; Tower v. Durell, 9 Ib. 332, and Chilton v. Robbins, 4 Ala. Rep. 223. The first and last of these cases are, where the indemnity was accepted before the dishonor of the note, and the principle upon which the decisions are made, is, that the party accepting the indemnity, is advised beforehand that the paper will not be paid, and has acted upon that advice so as to fully secure himself. The case is entirely changed when the default has taken place and the indorser has never been fixed by notice. Then the holder has never looked to the indorser for payment, nor has he acted upon information, which, in itself has been held to be equivalent to notice. We know of no decisions which carry the principle so far as to revive a liability which has been discharged, or rather, which never was fixed in consequence of the laches of the holder.

In Tower v. Durell, the other case cited by the defendant's counsel, it was decided that an indemnity taken by an indorser, under the impression it had been fixed by notice, was not sufficient to revive a liability which never in fact existed. It is not improbable that in equity the plaintiff in this case might compel the representatives of the indorser to enforce the indemnity received by him for their benefit; but, however that may be, we are satisfied that no obligation is created by it for them to answer for the indorsement, as if their liability had been fixed by notice.

This conclusion will enable us to decide all the questions raised on this record. The first count avers demand and notice in the usual form; the second describes the note and indorsement as made in Georgia, and sets out the law of that State which excuses demand and notice; the sixth count is upon an account stated; all these counts are substantially good; but the remainder are defective in showing no sufficient excuse for notice. The demurrers ought to have been sus-

tained therefore to the 3d, 4th, and 5th counts of the declaration.

There was also error in the charge of the Court, which instructed the jury that the acceptance of the indemnity was a revival of the indorser's liability.

For these errors the judgment must be reversed, and the cause remanded.

BEALL v. DEARING.

1. An abortive attempt to take the deposition of a non-resident, in whose possession a deed was last known to be, is equivalent to a demand of the deed.
2. Where a deed is of ancient date, is of such a character as would not probably be preserved a great length of time, as a bill of sale of slaves, and no inference can arise that the party improperly withholds the deed, a slight showing of diligence will be sufficient to let in the secondary evidence.
3. A certified copy of a registered deed, which the law does not require to be recorded, though not evidence of the contents of the deed, was proper to go to the Court, in the case of a deed thirty years old, to show, *prima facie*, that such a deed once existed; but before the jury, the party would have to prove the fact of the execution of the deed, as well as its contents.
4. The execution of a lost deed must be proved before secondary evidence can be given of its contents, but if it be thirty years old, its due execution may be presumed.

Error to the Circuit Court of Tuscaloosa.

TROVER for a slave by the plaintiff against the defendant in error. The plaintiff claimed the slave under the will of his father. The defendant claimed under one John S. Devan, who became possessed of the slave in right of his wife Sarah Garnett. The defendant relied on a deed from Matthew Beall to Sarah Garnett, conveying the slave in controversy, and for the purpose of proving by secondary evidence the contents of the deed, which was alledged to be lost, offered the following preliminary proofs:

The deposition of Mrs. Devan, her husband being dead,

which had been taken in the Territory of Florida, by interrogatories, at the instance of the defendant. The interrogatories propounded by the defendants related solely to the former existence and loss of the deed or bill of sale. The cross interrogatories related not only to the existence and loss of the bill of sale, but proposed a series of interrogatories to the witness upon the merits of the plaintiff's case.

The witness answered the first interrogatory, in substance, that the deed once existed, but was now, as she supposed, lost; and refused to answer the remaining interrogatories and cross interrogatories. To the reading of this deposition the plaintiff objected, because the cross interrogatories were not answered; but the Court permitted it to be read, and the plaintiff excepted.

The defendant also produced to the Court a certified transcript from the clerk's office of Washington County Court, of what purported to be a deed from Nathaniel Beall, the Surveyor General, dated 9th June, 1810, for a number of negroes, including the one in controversy, which appears to have been recorded on the 11th of April, 1815.

The defendant himself made oath before the Court, that Devan, the husband of Sarah Garnett, had, as he understood, died about ten years ago in or about Mobile, as he understood insolvent; and that he had never heard of any administration on his estate: that he knew nothing of the original deed—and had inquired of one Lyon, and another, who were understood to know something of it, but could learn nothing about it. That he had at great expense, sent on an agent to Florida, to procure the deed, if possible, or some evidence of it, who returned without giving any other account than that contained in Mrs. Devan's deposition. That he had heard of no other person from whom he could obtain information of the deed. This being all the testimony the plaintiff objected to the same as sufficient to let in secondary evidence of the contents of the deed, but the Court overruled the objection, and the plaintiff excepted.

The defendant then read the deposition of John Phillips, who among other things deposed, that about the year 1810, Nathaniel Beall sold all or most of his slaves to Sarah Garnett—that Beall handed him the bill of sale and requested him to take her notes for the purchase money—that he took her notes and

delivered them to Beall, and delivered the slaves to Sarah Garnett; among these slaves was the one in controversy. The plaintiff objected to this evidence to prove the contents of the deed, but the Court overruled the objection upon the ground that the jury must determine whether the contents of the deed were proved or not, to which the plaintiff excepted.

These several matters are now assigned for error.

PECK & CLARK, for plaintiff in error. The deposition was improperly admitted, because the cross interrogatories were not answered. [1 M. & S. 4, 6; Greenleaf's Ev. 590 § 554; Starkie Ev. 271, § 103; 1 Phillips Ev. 278.]

The execution of the deed should have been proved by the subscribing witnesses, and the case is not varied because the deed is alledged to be lost. [16 Johns. 193; 1 Phillips, 452.]

The preliminary testimony was not sufficient to authorize proof of the contents of the deed.

CRABB and P. MARTIN, contra.—Contended that this case was in all respects like the case of Mordecai v. Beall, 8th Porter, 529, and relied upon that case as in point.

ORMOND, J.—The question presented on the record and argued by the counsel, is, whether the preliminary evidence offered of the existence and loss of the deed, was sufficient to let in secondary evidence of its contents.

The principal question which has been argued was upon the admissibility of the deposition of Mrs. Devan, to prove the loss of the deed. The question whether the deposition could be read as testimony for any purpose, after she had declined to answer the cross interrogatories, some of which were certainly proper, and should have been answered, is not one of difficult solution; but I shall decline the consideration of the question, because it is not necessary to be determined. Conceding that the deposition could not be read as evidence, the abortive attempt to take it, is certainly equivalent to a demand of the deed from the person in whose possession it was last known to be; which when the deed was in possession of a non resident, was held by this Court to be sufficient, in the case of Mordecai v. Beall, 8th Porter, 529, and Swift v. Fitzhugh, 9th Porter, 39.

The question for the Court to determine was, whether the facts adduced raised the presumption that the deed once existed, and was now lost, or out of the power of the party to produce without fault on his part.

It has been frequently remarked by this and other Courts, that no general rule can be laid down on this subject, but that each case must in a great degree depend upon its own circumstances. In this case the deed was of very ancient date, being more than thirty years old at the time of the trial—it had never been in possession of the defendant, nor was it a muniment of his title, as it conveyed to his grantor many other slaves besides the one he purchased, and which purchase was made not from the grantor in the deed, but at sheriff's sale. In addition, the deed itself, a bill of sale of slaves, was not an instrument which would probably be preserved such a length of time, as a possession of less than one fourth of that period would be as good evidence of title, as would be afforded by the deed. No inference can arise that the defendant improperly withheld the deed, and altogether the facts present such a case as would require but a slight showing on the part of the defendant to let in the secondary evidence.

The evidence adduced, consisted of the oath of the defendant, denying all knowledge of the deed—and that he had made inquiry of such persons as were supposed to have knowledge of it. That Devan who had married the grantee, died insolvent, and that he did not know that any one had ever administered on his estate;—and finally, that he had sent to Florida, where Mrs. Devan resided, and made an ineffectual effort to take her deposition to establish the existence, loss, and contents of the deed. I consider this diligence quite sufficient to show that a proper search was made for the orginal, nor can I conceive what more could be required.

That the deed once existed, is conclusively established by the testimony of Phillips, though it does not appear that his testimony was offered to the Court in the first instance, but subsequently to the jury to prove the contents of the deed. The transcript from the records of Washington County Court, purporting to be a copy of the deed, is certainly not evidence of the contents of the deed, as there is no law requiring such an instrument to be recorded; but, in my opinion, under the cir-

cumstances of this case, it was sufficient evidence of the fact, that such a deed once existed, at least to permit the party to go before the jury, to the satisfaction of which he would be required to prove as well the execution of the deed, as its contents.

It is objected also that the subscribing witnesses should have been called. It is doubtless true that the execution of an absent or lost deed, must be proved in the same manner as if the deed was present, unless probably in a case where the deed is withheld by the opposite party; but if this deed had been produced, being more than thirty years old, it would have proved itself, and certainly the rule cannot be more stringent in this case, where the party relying on the deed never had, and was not entitled to the possession of it.

If, however, the evidence which it appears was offered to the Court in the first instance, and upon which it acted, was insufficient, it would be impossible for this Court to close its eyes to the fact, that evidence was subsequently offered to the jury establishing, beyond doubt, the execution of the deed, and the propriety of the judgment of the Court, and which indeed is not binding upon the jury, as they must finally pass upon the execution of the deed if that is contested.

Upon the whole, I feel thoroughly convinced that the proof was ample, at least *prima facie*, that the deed once existed; and that if not lost, it was not in the power of the defendant to produce it. If I could bring myself to entertain a doubt upon it, sitting as I do, from the incompetency of my colleagues, alone, I would give the plaintiff the benefit of it by causing two of the Circuit Judges to be summoned.

The question as to the sufficiency of the evidence to prove the contents of the deed was properly left to the jury. Let the judgment be affirmed.

NOTE—In this case Judges COLLIER and GOLDTHWAITE were incompetent to set.

BATES v. TERRELL.

1. B. being sued upon a promissory note, pleaded *non assumpsit*, want of consideration, &c.; upon the trial of the cause he offered in evidence a bond executed by the payee, conditioned to make title to a tract of land, and proposed to show that the note was given for the payment of part of the purchase money, and, that although, the condition of the bond did not recite its date truly, yet it was the same note, to which the condition referred: *Held*—that the bond should be permitted to go in evidence to the jury.
2. *Quere?*—Where notice is given to a party to produce the certificate of the receiver of the land office, showing the purchase of a tract of land, and he produces a patent for the same land issued six years before the trial, will it be intended that the party has ceased to be the custodian of the certificate, so as not to authorize the admission of parol evidence of its contents.
3. In an action upon a promissory note, which has been transferred by delivery, if the nominal plaintiff die, the suit progresses in the name of the real plaintiff, who is liable for costs; and a distributee of the estate of the deceased is a competent witness for the plaintiff.
4. Where there is a valid contract in writing, if the purchaser of land is in possession, he cannot resist the payment of purchase money by showing that the vendor has no title; but if the vendor's contract is void by the statute of frauds, the vendee may avoid the payment of the money agreed to be paid, although he has given his promissory note for the amount.

Writ of error to the Clerk of the County Court of Sumter.

THIS was an action of assumpsit at the suit of the defendant in error against the plaintiff, on a promissory note, dated the 11th of August, 1836, for the payment of seven hundred dollars on the first day of January, 1838. The defendant pleaded *non assumpsit*, want of consideration, and failure of consideration; and on these pleas issues were joined and the cause tried by a jury, who returned a verdict for the plaintiff, for the amount of the note and interest, and judgment was rendered accordingly.

On the trial the defendant excepted to the ruling of the Court. The following questions arise upon the bill of exceptions: 1. The defendant offered to read to the jury upon due proof of its execution, a bond executed by the nominal plaintiff, bearing date the 9th of August, 1836. The condition of

which recited that the latter had bargained and sold to the former, a tract of land situate in Sumter county; for which the defendant had given two promissory notes, the one payable on the first of December, 1836, and the other on the first of January, 1838—each for the sum of seven hundred dollars. It was stipulated that the bond should be void, if the plaintiff made a good and legal title on the payment of these notes to the defendant. The Court decided that the bond was not admissible, until the defendant showed that the note in question was one of those to which its condition referred. It was then remarked by the defendant that he expected to identify the note sued on, and establish its consideration by the bond, and other testimony which he intended to adduce. But the Court ruled that the note was not correctly described as to date in the condition, and should not be read, until the defendant showed by other testimony, the identity of the note.

2. The plaintiff had given notice to the defendant, to produce the certificate of the receiver in a land office, for "a certain piece of land, which it was proved was in the defendant's possession some years ago. The defendant produced a patent from the General Land Office for the land, dated six years before the notice was given to produce the certificate. The Court ruled that the production of the patent did not excuse the defendant for not producing the certificate, and that the plaintiff, although she had made no other effort to obtain the certificate or a copy, might prove its contents by parol.

3. The plaintiff called a witness who stated on his *voire dire* that the nominal plaintiff was dead, that he was one of her heirs, that the note was transferred by his mother to a third person by delivery, and by that person to the real plaintiff: that he (witness) had no interest in the event of the suit. The defendant objected that the witness was incompetent, on the ground of interest, but he was, notwithstanding, permitted to testify.

4. The defendant then offered evidence, tending to show that the note in suit was given in consideration of a verbal sale of land; and the plaintiff introduced proof to show that the contract was in writing. There was a conflict in the evidence, as to whether Bates ever was in possession of the land under his contract with the plaintiff, and there was no

testimony showing that he or any one else for him had made valuable improvements thereon. The proof was also contradictory, whether the defendant was to receive a title from the nominal plaintiff, or from a third person.

The Court charged the jury, that if they believed there was a verbal contract for the sale of the land, between the nominal plaintiff and the defendant, for which the note sued on was given, and the vendee has had possession and made valuable improvements, the vendor could be compelled in equity to convey; and consequently the plaintiff may recover in this action.

The Court further charged the jury, that if the contract for the sale of the land was verbal, and it was agreed that a third person should make the defendant a title, the plaintiff might recover if the defendant took possession and made valuable improvements, although the title had not been made.

Several charges were prayed and refused, which it will be unnecessary to notice, as they present the questions arising on the instructions given.

R. H. Smith, for the plaintiff in error. The charge as to valuable improvements by Bates, were uncalled for by the proof, and well calculated to mislead the jury. In respect to the verbal contract, possession under it did not of itself impart to it validity. [Johnson v. Hanson, 6 Ala. Rep. 351.] The bond was admissible evidence, and should not have been excluded. [8 Porter's Rep. 547; Bell v. Rhea, Conner & Co. 1 Ala. Rep. N. S. 83; 3 Id. 16, 371.]

The contents of the receipt for the purchase of land should not have been proved, as there was certainly better evidence obtainable to the point than the recollection of witnesses.

Hair & Hoit, for the defendants.

COLLIER, C. J.—The distinction between the admissibility and sufficiency of evidence has been repeatedly recognized by us; and where evidence tends to establish some material fact put in issue by the pleadings, it is *prima facie* competent. It frequently happens that a party can only make out his case by proving several distinct facts, either of which would be insufficient to lead the mind to a conclusion. In such case, all

that should be required, is to show the pertinency of the proof. That the time of the Court may not be uselessly employed, or the adverse party prejudiced by the introduction of testimony not calculated to promote a proper determination of of the cause, the party offering evidence may be required to state for what purpose it is adduced, and to say whether he intends to offer other proof in connection with it. It is said, "if evidence be irrelevant at the time it is adduced, it is not error to reject it, because other evidence may afterwards be given in connection with which it would be competent. If it would be relevant in conjunction with other facts. it should be proposed in connection with those facts, and an offer to follow the evidence proposed, with proof of those facts at a proper time." [Mardis' Admr's, v. Shackleford, 4 Ala. Rep. 493; Duffee v. Pennington, 1 Ala. Rep. N. S. 506; Bell v. Rhea, Conner & Co., Id. 83; Harrell v. Floyd and wife, 3 Id. 16; Williams v. Haney, Id. 317.]

Conceding that the bond *per se* was *prima facie* irrelevant, and if it was offered alone might have been rejected; yet we think it was clearly competent when aided by other proof to identify the note in question, and establish its consideration. The fact that the note and bond do not bear date of the same day, is an unimportant discrepancy which might be explained by proof. A date was not at all essential to either; and though each of them have one, it is allowable to show that they are erroneously dated, and were perfected by delivery on a day different from that they respectively indicated. The defendant announced his intention to offer the necessary assistant proof; this according to the law as we have stated it, should have induced the admission of the bond. If the defendant failed in adducing such proof, then the Court might have directed the bond to have been withdrawn, or have instructed the jury as to the effect they should accord to it.

Where notice is given to a party to produce a writing, it must be shown that it is in his possession, or power, before it can be said that he is in fault for not producing it, so as to admit secondary evidence of its contents. But possession is frequently presumed from the return of the paper, as well as other circumstances indicative of the place of its custody. A party cannot, by subsequently transferring the custody of a

paper to another person, defeat the operation of the notice to produce it; and if the party in good faith lets the paper go out of his hands after notice, he ought to apprise his adversary, so that he may know where to find it.

Where the party giving the notice, makes out a *prima facie* possession against him who is required to produce a paper, the latter it is said may be sworn to prove the contrary. [3 Phil. Ev. C. & H.'s notes, 1187, and cases there cited. See also Hammond v. Hopping, 13 Wend. Rep. 505.] The view which we take of this case, makes it unnecessary to determine whether the defendant's possession when notice was given, is inferable from the fact, that he had the certificate at some previous time; or whether that inference was not repelled by the production of the patent for the same land, dated some six years previous to the notice. The decision of this point may depend upon the fact, whether the certificate is usually returned to the land office where the patent is received as well as other extrinsic matters, about which the bill of exceptions is silent. In this condition of the record, we prefer laying down the principles which will most probably lead to a correct decision on another trial, without attempting to give to them a particular application.

We would remark, that although it may be possible the certificate may have been material evidence for the plaintiff for some purpose, its materiality is not shown by the bill of exceptions. And if important for the plaintiff, it may be worthy of inquiry, whether a copy may not be obtained from the land office; and if it can, whether parol evidence of its contents is admissible?

The objection to the son of the nominal plaintiff as a witness, was not well taken. He had no interest in the event of the suit. His distributive share of his mother's estate would not be increased or diminished by the result. Under our statute, the action abated as to her, and was continued in the name of the real plaintiff, who was made liable to a judgment for costs if unsuccessful. It is not known that the transfer of the note was made by her under such circumstances as would make her estate liable for its payment; and the interest of the witness cannot consequently be assumed.

The charge of the County Judge in which the jury were

instructed hypothetically, as to the effect of valuable improvements by the vendor, to take the case of a verbal contract for the sale of lands out of the statute of frauds, was uncalled for by the proof; and consequently could subserve no valuable purpose. Its effect may have been to mislead the jury by diverting their minds from the facts proved.—Be this as it may, it should not have been given.

In Johnson v. Hanson, at the last term, we decided that the vendor of land could not maintain an action upon a verbal contract for the purchase money, although the vendee is in possession, and has already made a partial payment. The difference between that case and the present is, that there, no note was given for the purchase money, but the vendee was in possession and had paid part of it; here, it is doubtful from the bill of exceptions whether he had ever had the possession, and it does not inform us that he had paid any thing. Assuming the facts of both cases as to the possession and payment to be identical, and the plaintiff is not placed in a more favorable position because he has the defendant's note. A promissory note does not state the terms of the contract of purchase, nor is it a memorandum from which it may be inferred. It is nothing more than a promise to pay money, for which the law implies a valuable consideration. But this implication is not conclusive, and it is permissible for the maker to show that it was given without, or for a consideration that has failed, or under such circumstances that the law will not coerce its payment. This may be done by showing that the undertaking of the payee which induced the maker's promise, is void and cannot be enforced. Now a verbal contract for the sale of lands is declared void by the statute of frauds, and we have seen that possession, even when coupled with part payment will not impart to it validity.

We have repeatedly held, that where there is a valid contract in writing for the sale of land, the purchaser cannot resist the payment of the purchase money, *if he is in possession*, by showing that his vendor has no title. The distinction between that case and one like the present is this: there the contract is valid according to legal forms, and the purchaser if evicted, has his remedy against the vendor. He affirms the contract on his part by retaining possession, and is thus

estopped from showing the invalidity of the seller to perform it. The law allows the purchaser, upon putting the vendor in default for the non-performance of his contract, to rescind and place himself in a position by which he can resist the payment.

But a contract for the sale of lands which is not evidenced by writing, is merely void; the performance of which the vendor cannot enforce; or even recover damages for its breach. The retention of possession in such case cannot estop him; for their is no valid contract to cause such an act thus to operate. Under such circumstances it is competent for the vendee to show that the consideration for his promise was an undertaking on the part of the vendor, which imposed no legal obligation.

It sufficiently appears from what has been said, that the County Court did not correctly apply the law; and without recapitulating, we will merely add, its judgment is reversed and the cause remanded.

DAVIS v. HUNTER.

1. When a struck jury is demanded by either party, the list of jurors from which the the striking is to be made must be subject to no good cause of challenge.
2. A bias or prejudice against crime in general, is not such as will constitute a good challenge for cause.
3. After a juror states that he is not sensible of any bias or prejudice in the case, it is not erroneous to refuse a further examination of the juror.

Writ of error to the Circuit Court of Dallas.

TRESPASS by Hunter against Davis, for killing a slave.

At the trial the defendant claimed a struck jury under the statute. [Clay's Dig. 459, § 52.] Accordingly a list of twenty-four jurors, then in attendance on the Court, was furnished to each of the parties. When their lists were furnished the plaintiff claimed the right to purge the pannel for cause, by asking

the questions contained in section 38, page 457, Clay's Digest. This was allowed, and the plaintiff excepted.

One of the jurors named in the lists, was so examined before the plaintiff was required to strike according to the act. On this examination, he answered, that he had formed and expressed an opinion in this case; and was one of the jurors who sat on the defendant's trial, when prosecuted criminally for killing the slave. This juror was set aside for cause, and another placed on the list.

Afterwards, the defendant, without waiving his exceptions, proceeded to examine jurors named in the lists in a similar way, and some were rejected by the Court on his motion.

One of the jurors so examined, said, he felt that he had some bias and prejudice in cases of this kind. He had heard a good time since, from rumor, that the plaintiff's overseer, (the defendant,) had killed one of his slaves, and that he was to be tried for it; but he stated that he knew nothing of the facts and circumstances of the case, and felt no more bias in this, than in suits of a similar character. The defendant's counsel proposed to ask this juror, whether, if the facts should turn out as he had heard them related, his bias and prejudice was such that he felt he could not do the defendant justice. This the Court refused.

Another juror was examined, and in addition to the same questions proposed to be asked the former juror, it was proposed by the defendant to ask this one—whether his bias and prejudice was not such as would induce him to look unfavorably upon circumstantial evidence, and extenuating circumstances in defendant's favor. This was also refused by the Court. The Court refused to exclude the jurors above named for cause, and they were put upon the parties. The defendant excepted to the ruling of the Court, in these several matters, as he did also to the charge of the Court upon the merits; but the latter not being urged at the argument, is unnecessary to be stated. The error relied upon to reverse the judgment is the ruling of the Court in relation to the formation of the jury.

Edwards, for the plaintiff in error, cited Clay's Dig. 459, § 52; 457, § 38; 4 Wend. 229; Bac. Ab. Jurors E.; 2 S. & P. 308.

Evans, contra.

GOLDTHWAITE, J.—The questions raised in this case involve to some degree the construction of the 38th and 52d sections of the chapter of the Criminal Code relating to grand and petit jurors. The first of these provides, that in civil cases the Court shall on motion of either party, examine, on oath, any person who is called as a juror therein, to know whether he is related to either party, or has any interest in the cause, or has expressed or formed any opinion, or is sensible of any bias or prejudice therein; and the party objecting to the juror may introduce any competent evidence in support of the objection; and if it shall appear to the Court, that the juror does not stand indifferent in the cause, another shall be called and placed in his stead, for the trial of the cause. The other directs that in all such cases, sounding in damages merely, or where the amount in controversy shall exceed one hundred dollars, either party at his election, shall be furnished with a list of twenty-four jurors in attendance on such Court; from which a jury shall be obtained, by the parties alternately striking one from the list, until twelve shall be stricken off—the plaintiff commencing: and the jury thus obtained shall not be further challenged for any cause. [Clay's Dig. 457, § 38; 459, § 52.] The defendant complains that the plaintiff was permitted to challenge several jurors for cause, previous to commencing the striking. This we think was proper enough, for it certainly cannot be supposed that he is obliged to submit his case to a prejudiced jury, because the other party has thought proper to demand the privilege of having one struck. The list of jurors from which the striking is to be made, must be composed of individuals who are not subject to any of the exceptions mentioned in the previous section.

2. The jurors whom the Court refused to exclude for cause, do not appear to have had that species of bias or prejudice, which would render them incompetent. If an opinion against violence and crime in general, was to be considered a prejudice sufficient to exclude a juror, it would be very difficult to procure a jury in any case; and here, what the individual spoke of, cannot, by any ingenuity, be made more of, than, that he had only the same bias in this suit than he had in all others of a similar nature. In our opinion this was no good cause of challenge.

3. After the juror had stated that he was sensible of no bias or prejudice in the cause, it was not proper for the Court to allow any further examination of the juror on that subject. If it was conceded that the answer, to the question disallowed by the Court, would have been in the affirmative, it would, in our opinion, have furnished no ground for the exclusion of the juror.

We can perceive no error in the points to which our attention has been directed, and the judgment is therefore affirmed.

KEMP & BUCKEY v. PORTER.

1. Where a levy is made on slaves and bond given to try the right by one claiming them, a subsequent junior execution cannot be levied on the same slaves, although they are left by the claimant with the defendant in execution.
2. The deputy clerk may take the probate of a deed in the absence of his principal.
3. The consent of a beneficiary of a trust deed will not be presumed, where the deed postpones the payment of the secured debt beyond the time when it fell due by the contract of the parties.

Error to the Circuit Court of Autauga.

This was a suggestion by the plaintiffs in error that the defendant, sheriff of Benton county, could by due diligence, have made the money on an execution of the plaintiffs against Edward Herndon and W. C. Kelly, and having made out a *prima facie* case, rested.

The sheriff then proved that four other executions which issued on judgments older than th at of the plaintiffs, came to the hands of his predecessor in office, and were levied by him on the same property this execution was levied on—that before the return day of the first execution, one Jesse G. Cobb, as the trustee of one Givens, interposed a claim to the slaves levied on, and that bond was given for the trial of the right, which is still pending in the Circuit Court of Benton.

The sheriff also proved that he made the levy on plaintiffs execution by request of their attorney, who instructed him if he could find no other property, to levy on such as had been levied on before. Upon the execution being returned a *venditioni exponas* was issued and sent to him to sell the property so levied on, and also a *pluries fi. fa.* the execution of which was arrested by an injunction out of Chancery.

The defendant also offered to read a deed executed by the defendant in execution, to J. G. Cobb, trustee for W. T. Givens, by which the property levied on was, before that time conveyed to secure the payment of certain debts due from Herndon, the probate of which was in the usual form, but taken by the deputy clerk. The plaintiffs objected to the reading of the deed, because it had not been truly probated, and because the assent of Givens to the deed was not shown. The Court was of opinion that the probate was insufficient, but refused to exclude the deed from the jury, and also overruled the objection of the want of assent by Givens.

The Court charged the jury, that if the property levied on by the plaintiffs execution, had been previously levied on by executions of older date, and claims interposed to try the right of property, which were still pending, the sheriff could not be charged in this proceeding.

That in regard to the levy on land by all the executions, if the first four were issued on judgments older than the plaintiffs, they were first to be satisfied; and the sheriff was not liable to the plaintiffs, unless the land was of value sufficient more than to satisfy the older judgments.

That if the *venditioni exponas* had been enjoined before the return day, the sheriff was not liable for not selling.

The counsel for the plaintiffs moved the Court to instruct the jury, that if after the levy by Price and the claim interposed by Cobb, the property did not remain in the possession of Price or Cobb, but was left in the possession of Herndon, that then the levy by Price was not a bar to the plaintiffs execution on the same property, though the proceedings were still pending upon the claims—which instruction the Court refused to give, and the plaintiffs excepted.

These matters are now assigned for error.

PRYOR, for the plaintiffs in error, cited, 1 M. & S. 711; 14 Mass. 190, 217, 352; 11 Pick. 519; 13 Mass. 114; 7 Cow. 271; 8 B. & C. 589; 4 D. & E. 621; 10 Mass. 125; 16 Id. 465; 12 Id. 495.

ORMOND, J.—In this case an opinion was announced adverse to the plaintiffs in error at the last term of this Court, and upon their petition the cause has been again reheard. During the period that the cause has been under consideration, the case of Langdon & Co. v. Brumby, has been determined. It was there held that the levy of an execution and bond given to try the right of property under the statute, exempted the property so levied on from another levy, at the instance of a junior execution creditor.

This we understand to be the predicament of this case. Four executions senior to that of the plaintiffs in error, and issued on judgments admitted to be older than their's, against the same defendant in execution, came to the hands of Price, the predecessor of the defendant in error, and were by him levied on the same property subsequently levied on by the defendant in error, by the direction of the plaintiffs attorney, previous to which levy, the slaves so levied on had been claimed by one Cobb, as his property, and bond given to try the right of property against the plaintiffs in the four first executions, which trials were still pending, down to the trial of this cause. The levy thus made was fruitless, upon the authority of the case cited, as to the slaves levied on in both executions, as in their condition they were not subject to levy by the plaintiffs execution.

It is however strenuously insisted, that as the claimant permitted the slaves to remain in the possession of the defendant in execution, after the claim was interposed, the property became subject to seizure by a subsequent judgment creditor. We are of the opinion that the fact, merely, that the claimant permitted the property to remain in the possession of the debtor, does not authorize the sale of property so circumstanced by a junior judgment creditor. When the claim is interposed the property is in the custody of the law, and the possession of the defendant in execution, is that of a bailiff merely. This point was thus ruled in Rives & Owen, v. Welborn,

6 Ala. Rep. 45, the facts of which as to this point, are precisely analogous to this case.

It is unnecessary to consider the question arising under the injunction from Chancery, forbidding the sheriff from selling under the *venditioni exponas*, as it is only insisted that the default of the sheriff arose under the previous *alias fi. fa.* the effect of which we have considered.

We understand the question upon the probate of the deed to be, not whether the probate in the clerk's office was sufficient to authorize the deed to be read without further proof, but whether the probate was sufficient to justify its registration in the office. The objection urged is, that the probate was taken by the deputy instead of the principal clerk. By the act of 1836, (Clay's Digest, 146, § 19,) the deputy clerk is authorized to do all acts in the absence of the principal clerk which the principal could do were he present. This is conclusive of the question—as we must presume, until the contrary is shown, that the principal was absent, and that the deputy was therefore authorized to act.

This Court as well as others has repeatedly held, that the assent of the beneficiary of a deed to its provisions will be presumed until the contrary is shown. This presumption is founded on the benefit which the grantee derives from the deed, and ceases when it imposes onerous conditions as the price of the benefit conferred. In Elmes v. Sutherland, at the present term, it was held, that where a deed conveyed property in payment of a debt, but postponed the time of payment to a period beyond the time when the debt was due, and also stipulated for the enjoyment by the grantor of the proproperty conveyed during such period, that the assent of the beneficiary would not be presumed. Such is the condition of this deed. It is made to secure the payment of twenty-one thousand dollars stated in the deed, to be due on promissory notes, all of which it appears from the deed were due at the time of its execution, (the 20th April, 1840,) yet the deed provides that the property which is conveyed in trust for the payment of the debt, shall be retained by the grantor until the 25th of December, 1843, and shall not be sold for the payment of the debt until after that period. This deed is not therefore necessarily beneficial to the grantee or beneficiary, and

his assent to it must be shown, to prevent the property conveyed by it, from being subject to the claims of other creditors. In ruling that the assent of Givens the beneficiary was not necessary, the Court erred.

The counsel for the plaintiffs in error has submitted an argument, that the sheriff was guilty of a default in not selling the lands levied on. This was a levy on some town lots in the town of Jacksonville, which were levied on, both in virtue of the four senior executions, and that of the plaintiffs in error. Whether these lots were subject to sale or not, appears to depend on another question, whether the deed first spoken of in which they are conveyed, is valid as against the plaintiffs. The deed bears date anterior to any of the judgments, and conveys the legal title to another, and if the deed is operative under our statute, the equitable interest of the grantor could not be sold. Other suppositions might be indulged in, but it is unnecessary to discuss questions not necessary to the decision of the case, and which may not again be presented.

Let the judgment be reversed and the cause remanded.

STOVER v. HERRINGTON, ET AL.

1. Where a mortgage states, the debt intended to be secured, at an amount greatly beyond what is due, this at most is *prima facie* evidence of fraud, and may be repelled by showing the fairness of intention *on the part of the mortgagee.*
2. A mortgagee by purchasing a part of the mortgaged property in payment of a debt not secured, does not prejudice his mortgage as to the remainder.
3. Where a mortgagee who was a surety for the payment of the debt, against which the mortgage was intended to indemnify him, executed as the surety of the mortgagor, a bond for the prosecution of a writ of error, sued out by the latter, to cause to be revised a several judgment rendered against him, upon one of the debts provided for, the mortgagee will not thereby defeat the mortgage, or in any manner affect its validity.
4. Where the principal executes a mortgage for the indemnity of his surety, and a judgment is afterwards rendered against the principal and surety for the debt intended to be secured, but before such judgment is obtained, other judgments

are rendered and executions issued, so as to create a lien upon the principal's property, the surety cannot in virtue of the lien of his mortgage, give a preference to an execution of the plaintiff in the judgment against himself and principal; but if he would make his security available he must proceed under the mortgage.

5. A man in failing circumstances may prefer one creditor to all others, if there be no opposing liens upon his property; and a grantee who is influenced by honest purposes cannot be prejudiced by the *mala fides* of his grantor.

6. Where a mortgagee under the impression that a judgment and execution for the debt intended to be secured, will draw to them the lien of the mortgage, causes the mortgaged property to be levied on and sold, and becomes himself the purchaser; if he afterwards discover that other liens superior to the execution under which the sale was made, attached after the mortgage was executed, he may go into equity, and foreclose the mortgage; especially upon his stipulating that the property shall sell for as much as it did at the execution sale.

Writ of error to the Court of Chancery sitting in Wilcox.

In March, 1842, the plaintiff in error filed his bill against the defendants, setting forth that on the twenty-fourth of March, 1838, the defendant, Herrington, conveyed to him several tracts of land, (all of which are particularly described,) situate in the county of Wilcox, and sundry slaves, whose names and ages are respectively stated. This conveyance is conditional and avowedly for the purpose of securing the payment of three promissory notes, bearing even date therewith: the first, for the sum of twenty-seven hundred dollars, and payable on the first day of May, 1839; the others for the sum of eight thousand, six hundred and fifty dollars, each, payable, the one on the first day of May, 1840, and the other on the first day of May, 1841. These notes were made in the presence of witnesses, at the time of the execution of the mortgage, with the express understanding and agreement that the mortgage was given to indemnify the complainant for all liabilities he was under for the mortgagor: and the aggregate amount of the notes it was agreed should be twenty thousand dollars, because the precise amount of the complainant's engagements for the defendant could not then be ascertained.

It is further stated, that among other liabilities for Herrington, the complainant was his security on two promissory notes, payable to Samuel Snipes, each for three thousand, three hundred and thirty-three dollars, dated the eighth of May, 1836, and payable, the one on the first day of January, 1838, and the other on the first of January, 1839. Both of these notes have

been paid by the complainant, and the amount of them (with damages and costs on the one last payable,) is now due to him, excepting such sum as the sheriff collected by the sale of Herrington's property, as hereinafter stated. Complainant believes that the mortgagor has paid all the other debts upon which he was a surety, or he has not been called on to pay them.

The complainant charges, that Herrington removed from the United States in the spring of the year 1840, carrying with him all the slaves embraced by the mortgage, saving a girl named Jane, (whom he sold to the defendant Burns, a short time previously,) and a woman named Judy. These slaves have been since sold under an execution issued on a judgment rendered against Herrington and the complainant, on the last note payable to Snipes; Jane for three hundred and thirty-five dollars, and Judy for one hundred and seventy dollars. In addition to this, the lands conveyed by the mortgage were pointed out by the complainant to the sheriff, under the impression that such was the proper course, and the same were levied on and sold for the sum of six hundred and eighteen dollars; at which sale the complainant became the purchaser. These several sums, together with the amount for which a small part of the stock were sold, were all credited on the execution before referred to.

It is also stated, that the defendant Burns, has brought an action against the complainant for the recovery of the girl Jane, or her value, which is still pending. *Further*—that after the judgment against Herrington and the complainant, had been recovered in the County Court, and about one month previous to its affirmance by the Supreme Court, (whither the case had been removed by writ of error,) the defendant Bonner, sued out an attachment returnable to the Circuit Court of Wilcox, and long after the sale under the execution as stated above, recovered a judgment against Herrington. This attachment was levied on the land in question, and the same was again levied on, and sold under an execution on Bonner's judgment. The complainant caused public notice to be given of his right to the lands at the time of their sale; notwithstanding this, Bonner became the purchaser of the same for the sum of fifty dollars.

The mortgage and notes recited in it are exhibited with the bill, and a knowledge of their existence charged to have been

communicated to both Burns and Bonner, previous to their respective purchases: in addition to which the mortgage is alledged to have been duly recorded in less than thirty days after its execution.

The prayer of the bill is, that the sale made by the sheriff of the slaves, Jane and Judy, the stock and lands to the complainant may be confirmed and allowed, or that the same be resold under the mortgage: that inasmuch as the lands, or Herrington's right of redemption therein, were sold by Bonner's direction under his execution, and purchased by him, it is prayed that he may be compelled to satisfy the complainant's demand, or to the extent of the value of the lands; and that an account be taken between the complainant and Herrington. *Further*—that Burns be enjoined from proceeding in his suit at law against the complainant; and that Herrington, Bonner and Burns each answer the bill.

Publication was made as to Herrington, who was a non-resident, and having failed to answer, the bill as to him was taken for confessed; the other defendants filed their answers. The defendant Burns, admits that Herrington made such a mortgage as is described in complainant's bill, but whether there was any understanding at the time of its execution, other than what is expressed upon its face, he does not know; but he is informed, and believes, that the three notes, which are stated as the consideration of the mortgage, were merely voluntary, and intended to furnish a pretext by which the creditors of the mortgagor might be hindered and delayed in the collection of their debts. Defendant has been informed, and believes, that when Herrington left this State, he was not in arrears to the complainant more than two hundred and sixty dollars, and that he left enough property to pay the same, on which the complainant caused an attachment to be levied in April, 1840. In respect to the complainant being surety on the two notes payable to Snipes, or otherwise bound for the debts of Herrington, or his having paid these notes, the defendant knows nothing, except as informed by the bill. When Herrington removed he left two other slaves besides Jane and Judy, who were embraced by the mortgage, viz: Bill and Charles—together with some mules, which the complainant told defendant he would take, but whether he ever did obtain possession of

them defendant does not know. After the execution of the mortgage, and previous to Herrington's removal, the complainant purchased two of the slaves, which were mortgaged to him, viz: Rachel and Maria or Mary.

The defendant further states, that the complainant and Jesse Womack purchased the note payable to Snipes, which was first payable, and that with the exception of two hundred and sixty dollars, it was paid by the mortgagee, before he left the State. This balance, with the second note, was all the complainant could claim of Herrington when he removed. The slave Jane was purchased by defendant sometime before the mortgagor's removal, and complainant did not object to it, until after that event; although defendant is informed and believes that he was informed of it: in fact, complainant remarked to him that he would have given him a bill of sale for the girl, if he had been applied to previously.

It is further stated, that the judgment of the County Court on the second note to Snipes, was rendered against Herrington alone, and that an execution issued thereon in 1839, was levied on property of value sufficient to satisfy the same—a forthcoming bond given and forfeited, and an execution issued thereon, which would have been forfeited, but for the execution of a bond for a writ of error, in which the complainant was the sole surety.

Defendant submits, that as the complainant never relied on his mortgage, but pointed out the slave Jane, with the lands, &c., to be sold under execution, whether he can now be permitted to set up his mortgage as a lien on this property.

The answer of the defendant, Bonner, is substantially the same with that of Burns, except as to the girl Jane, about whom his answer is not so full; in addition, he states, that his attachment was sued out at the time alledged, that he recovered a judgment in the fall of 1841, for the sum of four hundred and ten and 19-100 dollars, besides costs: that the execution issued thereon under which the lands in question, (which had been previously levied on by attachment) were regularly sold on the first Monday in March, 1842, and the defendant became the purchaser for the sum of fifty dollars. Defendant admits that he had notice of the mortgage before the lands were sold, but insists, as does his co-defendant, that the same was without

consideration and voluntary, intended to hinder and delay the creditors of the mortgagor.

The testimony was taken at the instance, both of the complainant, and the defendants, Burns and Bonner, and so far as material may be thus condensed, viz: Sterrett proves the consideration of the mortgage, and the inducement to make it, to have been such as is stated in the bill. He does not know the slaves embraced by it, but one was named Jane—saw Herrington sign the three notes for twenty thousand dollars—and considers the complainant's character for integrity to be above all suspcion.

Warren states, that complainant told him he had the mortgage—it was in the only form in which Herrington would give it, yet he disliked to take it for so large an amount. Complainant said it was intended to secure all the mortgagor's property; but he did not intimate that it was designed to prevent any other creditor from collecting his debt.

Curtis says, both parties consulted him as to the propriety of executing the mortgage—he was not present when it was executed, although its execution took place at his house—and as he understood in a public manner. The girl, Jane, in controversy in this suit, is the same who is embraced in the mortgage. Knows complainant was surety for Herrington for a large sum, and that his character is unexceptionable. Complainant signed the writ of error bond, because H. sold him two negroes for $1,600, in part payment of a debt of $2,000, which he owed him. H. did not leave property enough when he removed to pay $350.

Burnett knows that the complainant has paid on the judgment recovered on the second note to Snipes, three thousand, one hundred and thirty-two dollars. Complainant said when the lands were sold under the execution in that case, that the title would be good. The stock which was left by H. sold for $270 06-100. Complainant's character was good.

Daniel estimates the value of the lands, negroes, horses and mules, conveyed by H. to have been $8,195, at the date of the mortgage; but when the last note to Snipes was payable all the property included in the mortgage would not have sold for more than about $5,000. Although the execution was levied on H's property, it was that which was mortgaged;

and H. was unable to satisfy the execution without its sale. Rachel and Maria were purchased by the complainant to pay a debt due him. Witness believes Burns knew Jane was mortgaged when he purchased her.

Gibson says, the complainant told him that he purchased Rachel and Maria of Herrington in full payment of a note, which he held against H.—to effect the purchase he had to become his surety for the writ of error; which he regretted. Witness does not recollect, but thinks the complainant paid $1,750 for these negroes.

Burt proves that the complainant told him that he put up a printed notice in different parts of the county, previous to the sale of the lands under the execution against Herrington and complainant, in which it was stated that the title of the purchaser would be good.

Jenkins states, that he wrote the notice alluded to by the last witness, under directions from complainant, who said he wished the lands to sell for their value; and they were sold under the execution against Herrington.

To so much of the evidence as tends to add to, alter, or qualify the consideration expressed on the face of the mortgage, as well as to such parts of the testimony as relates to the complainant's character, the defendants objected; and their objection was sustained.

The Chancellor was of opinion that the facts established these conclusions: 1. That Herrington was greatly embarrassed at the time the mortgage was executed. 2. That the mortgage embraced his entire estate. 3. That whatever may have been the complainant's intentions, Herrington intended to delay and hinder his creditors in the collection of their debts. 4. That the notes described in the mortgage as the inducement to its execution, were not sustained by a sufficient consideration. 5. That the judgment on the second note to Snipes might have been collected by a sale of property which H. removed, if the complainant had not prevented it by becoming his surety for a writ of error. As legal deductions from the facts it was held, that the complainant could not be allowed to prove any other consideration for the mortgage than it expressed; and that the mortgage was fraudulent: consequently the bill was dissmissed at the complainant's cost.

BETHEA, for the plaintiff in error, insisted, that the facts did not warrant the conclusion that the mortgage was made otherwise than in good faith, at least so far as the complainant was concerned. True, it is not pretended, that the mortgagor was indebted to the complainant to the amount of the three notes, or any other certain sum, when the mortgage was executed; but only that the latter was his surety for the payment of debts, which might or might not be less than twenty thousand dollars. And if the intention of the mortgagee was honest, and his only purpose was to indemnify himself against the consequences of his suretyship, the mortgage is clearly good. No principle of law is violated by permitting the complainant to show the extent of his liabilities or advances for the mortgagor; especially, when he shows that the reason why he received the notes was, because they could not determine with precision the amount proposed to be secured by the mortgage. [1 Ala. Rep. N. S. 29; Id. 736–7; 4 Kent's Com. 142–5, 163–4; 7 Cranch's Rep. 42.]

SELLERS, for the defendant Bonner, submitted the cause on his part. DEAR, for the defendant Burns, made the following points in writing:

1. The complainant should have alledged fraud in his bill, to authorize the admission of evidence to add to, or alter a written contract; such testimony would then be allowable, but the allegation must be made; for it is a rule in equity as well as at law, that the *allegata* and *probata* must correspond. [8 Por. Rep. 211; 1 Ala. Rep. N. S. 160, 330; 2 Id. 571; 2 Story's Equity, 746; 1 Johns. Ch. Rep. 429.]

2. To authorize the proof of a consideration other than what is expressed in the writing, it should profess to be founded upon "other considerations;" for a contract cannot be partly in writing and partly by parol. [2 Plow's Rep. 292; 1 Ves. Rep. 127; 1 Johns. Rep. 139; 3 Id. 210, 506; 7 Id. 341; 1 Johns. Ch. Rep. 281; 2 Story's Equity, 746.]

3. A deed void for fraud in fact is void *in toto*, and cannot be enforced to any extent in equity, (3 Ala. Rep. 444,) nor stand as a security for subsequent advances, (4 Johns. Rep. 536, 597;) so where the first conveyance is fraudulent, and another is made for the same property in good faith and for a

valuable consideration, the latter shall prevail. [1 Alabama Rep. 237.]

4. The registration of a fraudulent mortgage cannot give to it validity, or operate as notice of its contents. By pointing out the property to the sheriff to sell under execution, the complainant impliedly admitted that it was invalid, and cannot now be permitted to set it up. [4 Stewart & Porter's Rep. 237.]

5. Where a mortgagor is in possession by the terms of the mortgage, he has a right to sell the property, and his vendee becomes entitled to all his interest. In the present case the complainant might have sold the lands, and slaves, Jane and Judy, without causing the sheriff to levy on them.

6. Where the property conveyed is greatly disproportioned to the debt intended to be secured, it affords a strong presumption of fraud. [1 Porter's Rep. 355.]

7. The party seeking to establish a deed cannot be allowed to vary it by the introduction of parol evidence. [2 Ala. Rep. 599, 600, 615.]

COLLIER, C. J.—In Shirras, et al. v. Craig & Mitchell, 7 Cranch's Rep. 34, a suit was brought for the foreclosure of a mortgage, and it was objected to the validity of the deed that it did not truly state the mortgagor's indebtedness, but greatly exaggerated it. The Court said, "It is true that the real transaction does not appear on the face of the mortgage. The deed purports to secure a debt of £30,000 sterling, due to all the mortgagees. It was really intended to secure different sums, due at the time to particular mortgagees, advances afterwards to be made, and liabilities to be incurred to an uncertain amount. It is not to be denied that a deed which misrepresents the transaction it recites, and the consideration on which it is executed, is liable to suspicion. It must sustain a rigorous examination. It is certainly always advisable fairly and plainly to state the truth. But if upon investigation the real transaction shall appear to be fair, though somewhat variant from that which is described, it would seem to be unjust and unprecedented to deprive the person claiming under the deed, of his real equitable rights, unless it be in favor of a person who has been in fact injured and deceived by the misrep-

resentation." [Doe, ex dem. Duval's heirs v. McLoskey, 1 Ala. Rep. N. S. 736-7.] So in Prince v. Shepard, 9 Pick. Rep. 176, the debt described in a conveyance for the creditor's benefit exceeded the amount really due, yet it was held that this might be explained so as to rebut the presumption of fraud. The statement of the consideration in the mortgage at a sum much greater than what was really due, is at most only presumptive evidence of fraud. [Parker v. Barker, 2 Metc. Rep. 423.]

Although no consideration be mentioned in a deed, yet it is not for that cause void; for every deed imports a consideration, and it devolves on the party who alledges the reverse to offer proof of the want of it. [Boynton v. Rees, 8 Pick. Rep. 329; Clapp v. Terrell, 20 Pick. Rep. 250.] So it has been held that a conveyance originally void as against creditors in consequence of fraud, may acquire validity, if the fraudulent intent be abandoned, and the confirmation of the conveyance made for adequate consideration. [Oriental Bank v. Harkins, 3 Metc. Rep. 332.] And a mortgage or other transfer of property executed with intent to defraud creditors cannot be avoided by them, unless the grantee participated in the fraudulent intent. [Jones v. Norris, 2 Ala. Rep. 526; Harrison v. Phillip's Academy, 12 Mass. Rep. 456; Foster v. Hall, 12 Pick. Rep. 89; Bridge v. Eggleston, 14 Mass. Rep. 250; Johnson v. Johnson, 3 Metc. Rep. 63.] Nor can a fraudulent grantee be treated as a trustee of the grantor, if he has paid *bona fide*, debts of the grantor to the full amount of the property received—(Thomas v. Goodwin, 12 Mass. Rep. 140) —and if he has paid a less amount he shall be entitled to a deduction *pro tanto* if there are no paramount liens. [Parker v. Barker, 3 Metc. Rep. 423. See also Burnett v. Stanton & Pollard, 2 Ala. Rep. 190; Cummins & Cooper v. McCullough, 5 Alabama Rep. 324.]

Sometimes the question of fraud *vel non* is determined upon an inspection of the deed without the aid of extrinsic proof. [Ashurst v. Martin, 9 Porter's Rep. 566; Gazzam v. Poyntz, 4 Ala. Rep. 372.] But in the present case it is not insisted that the mortgage itself discovers a legal objection, but that it is defective, because it does not truly state the consideration: and this fact is brought to the view of the Court

by testimony *aliunde*. In this aspect of the case the existence of fraud must depend upon the intention of the parties as shown by the proof, or inferred from established facts. [See the cases last cited, also Wadsworth v. Marsh, 9 Conn. Rep. 481; Jackson v. Mather, 7 Cow. Rep. 304.]

If the view taken of the law be correct, there can be no question that the depositions explanatory of the circumstances under which the mortgage was executed, and for the purpose of showing the extent of the mortgagor's indebtedness, are clearly admissible. And it is equally clear that they do not show the complainant to be guilty of a fraud in obtaining the mortgage. The statement of an exaggerated consideration, in the language of some of the cases cited, is at most *prima facie* evidence of fraud, and may be repelled by showing the fairness of intention on the part of the mortgagee. This has been done by the testimony in the cause, which very satisfactorily shows that the complainant did not intend to deceive any one; and that the consideration was misstated, because the amount for which he was the surety of Herrington was unknown to them at the time the mortgage was executed; and perhaps it was the only form in which the security could be obtained; the mortgagor may, and most probably did, intend to defraud his creditors, but this we have seen cannot prejudice the complainant, who did not concur in such a purpose. That there was a consideration for the mortgage, as well as the amount of it, is well established by the proof. The complainant claimed nothing more than was really due, and thus far we have seen his lien may be sustained.

The purchase by the complainant of two of the slaves embraced by the mortgage, cannot impair his lien as to the others. It cannot be inferred that he intended thereby to assist in defrauding the creditors of Herrington. The presumption from the proof is, that he esteemed the security sufficient for his indemnity without these slaves, or if not, that he considered it most beneficial to himself to purchase them in extinguishment of another debt that was due him from the mortgagor. Nor is fraud a legal conclusion from the fact, that the complainant became Herrington's surety in a bond for a writ of error, sued out to revise a judgment upon one of the notes against which it was the object of the mortgage to

indemnify him. Perhaps it may have been supposed that the judgment would be avoided *in toto*, the complainant absolved from liability to pay the note, and his lien of course discharged. Be this as it may, it would seem from the proof that he did not act from a sinister motive, but was forced to execute the bond in order to obtain the two slaves.

The complainant was certainly mistaken, in supposing that he could enforce the lien of his mortgae, by causing an execution to be levied on the mortgaged property, while there were older executions in the sheriff's hands against the mortgagor's estate. But this cannot operate as an estoppel, so as to preclude him from showing that he never intended to abandon the mortgage. The proof, instead of showing that he contemplated such a purpose, warrants the inference, that he supposed the execution when enforced for his benefit, acquired potency from the mortgage. This accounts for the solicitude felt and efforts made by the complainant, to cause the lands to sell for a fair market value at the sheriff's sale. He was doubtless of opinion that his interest as a mortgagee would prevent competition, and the advertisement put up in different places, was intended to encourage bidders by quieting their apprehensions as to the title.

We have seen that the evidence instead of connecting the complainant with the fraud (if any) which was purposed by Herrington, entirely exculpates him. The fact that the latter was embarrassed and conveyed his entire estate, considering, that the only object of the complainant was to indemnify himself against the consequences of his suretyship, cannot in any manner affect the validity of the mortgage. A party though indebted beyond his means of payment may prefer one creditor to all others, and transfer to him or for his security, all his property, where there are no paramount liens upon it. There may perhaps be cases, where the disproportion between the liability intended to be secured and the property conveyed is so great as to authorize the presumption of fraud; but the present is not a case of that character.

It is clear that the mortgage imparted no aid to the execution under which the complainant purchased, and consequently he acquired no title as against the judgment and older *fieri facias* under which Bonner claims. The purchase by Burns

of the slave Jane was good against an execution, the lien of which was not previously operative. This being the case, the complainant is remediless unless Chancery can interpose, and administer relief. From the cause, as presented to us, there is nothing attributable to him incompatible with honesty of intention; nor is any sufficient reason shown, why the sales to Bonner and Burns should not be avoided; and the purchases by the complainant declared to be null; especially upon his stipulating that the property should sell for as much as it did under the execution sale at which he purchased. This being done, no objection is perceived in the present posture of the case to a foreclosure of the mortgage, and a decree for the sale of the property embraced by it.

That the cause may be proceeded in according to the principles of equity and the rules of procedure therein, the decree of the Court of Chancery is reversed, and the cause remanded, at the cost of the defendants in error.

GARY v. BOYKIN.

1. Where the plaintiff excuses the sheriff from his duty to return an execution, he cannot afterwards maintain a motion under the statute for the omission.
2. Where the principal sum of an execution has been accepted by the plaintiff from the sheriff, neither the plaintiff nor any officer of Court in his name, can maintain a motion, under the statute, against the sheriff and his sureties, for the costs.

Writ of error to the County Court of Sumter.

Motion against Gary, as sheriff of Sumter, for having failed to return an execution at the suit of Boykin. The defendant pleaded:

1. That before the return day of the execution the sheriff paid to the plaintiff the damages and interest mentioned therein; and he then excused the sheriff from returning it.

2. A similar plea, with the further averment, that the money so paid was accepted in full satisfaction, and that the plaintiff had not been aggrieved or injured by the failure of the

sheriff to return the said execution. Demurrers were sustained to both these pleas, and at the trial, upon an issue to the country on another plea, it was offered to be shown that the proceeding, though in the name of the plaintiff in execution, was in fact instituted for the use and prosecuted for the benefit of Price Williams, the clerk of the said Court, as a means of securing his fees in the case; and a receipt from him to the sheriff for 200 dollars as fees paid, but not expressing what cases the sum was to be applied to, was also offered. The evidence was rejected and the defendant excepted.

There is now assigned as error, 1. The overruling of the pleas. 2. The exclusion of the evidence.

Bliss and Reavis, for the plaintiff in error made the following points:

1. That it is a sufficient excuse for the omission to return an execution, that the plaintiff has been paid the money. [4 Ala. Rep. 539.]

2. A rule cannot be maintained, whether the money is made or otherwise, if the plaintiff excuses the return. [5 Ala. Rep. 65.]

3. The clerk has no right to use the plaintiff's name to recover his costs. [Clay's Digest, 205, § 21, 22.]

4. That if the clerk had such a right, the evidence rejected was proper to go to the jury.

R. H. Smith, contra, argued that the plaintiff being responsible, in the event of a return of no property to pay the costs, he is entitled to his motion, although the principal is paid; and the clerk has the right to use his name to collect the costs coming to himself.

GOLDTHWAITE, J.—1. So far as the questions raised in this case are connected with the pleas, we think they are concluded by the case of McClure v. Colclough, 5 Ala. Rep. 65, when we held, that if the plaintiff's attorney, or an agent properly authorized, induces the sheriff by any advice or direction, to delay the return of an execution, this would constitute a defence to a rule against the sheriff and his sureties. We also said in that case that the plaintiff had an undoubted right to control his own process, and relieve the sheriff from

the necessity of returning it when not executed. Here, the pleas are, that the plaintiff excused the sheriff from making any return of the execution upon which this motion is founded.

2. We think also that the other questions are covered by the decision in Freeman v. Womack, 4 Ala. Rep. 541, where a majority of the Court held, that a motion against the sheriff, upon a suggestion that the money could have been made by the use of due diligence, could not be maintained after the acceptance of the principal sum by the plaintiff. For such neglect the statute gives ten per cent. damages; neither these nor the costs were paid by the sheriff; but the Court considered the right to the damages as not being the principal matter provided for by the act; and therefore they could not be recovered after the principal had been paid. In relation to the costs, it was said, the plaintiff was not in a more favorable position, as they were due to the officers of Court.

Independent of this decision we think the several statutes, authorizing rules of a summary nature against the sheriff are all intended to provide for the security of suitors, and that they do not apply to officers who seek to recover costs only. In most cases the costs are distributable to many different persons, and probably it would not be tolerated, that separate motions should be maintained by them, even if they were clearly provided for by the terms of the act; but however this may be, we are well satisfied that they have no authority to use the plaintiff's name, either severally or collectively for this purpose.

It is manifest according to these views that the Court erred. Its judgment is therefore reversed, and, if desired, the cause will be remanded.

CRAWFORD v. CLUTE & MEAD.

1. A pending attachment may be pleaded in abatement by the garnishee, when sued for the same debt, by the original creditor.
2. The plea must contain averments of all the facts necessary to give the Court in which the attachment is pending jurisdiction, and must show whether the whole or what portion of the debt has been attached. A plea in abatement, therefore, setting forth that garnishee process had issued upon a judgment, which did not aver the amount recovered by such judgment, or that the affidavit which the statute requires had been made, is bad on general demurrer.
3. It would be the duty of the Court in which such suit is brought, upon being certified of a pending attachment for the same debt, to stay the proceedings until the attachment suit is determined; and after judgment, if no plea had been interposed, or an ineffectual effort had been made to plead the fact in abatement, to stay the execution until the attachment was determined, upon a satisfactory indemnity being executed by the garnishee.

Error to the Circuit Court of Mobile.

ASSUMPSIT by the defendants in error, as indorsees of a promissory note, made by the plaintiff in error, to one D. Jones.

To a declaration in the usual form, the defendants pleaded as follows:

The said William Crawford comes in proper person, and defends the wrong and injury, &c., and for plea saith—that on the 29th day of July, in the year 1839, a writ of garnishment issued from the Circuit Court of the United States, in and for the Ninth Judicial Circuit, at the instance, and in the name of Waldron, Thomas & Co., commanding the said William Crawford to appear at the next term of the said Court, to be holden in the City of Mobile, and answer, on oath, what he was at that time indebted to one David Jones and William J. Aubry, lately trading under the firm of D. Jones & Co. That the said note described in the said indorsement on the writ of the said plaintiff, was given by the said William Crawford to the said David Jones—that the said David Jones from whom the said plaintiffs derive their title to the said note, is the same identical David Jones, against whom the said Waldron, Thomas & Co. obtained judgment in the said Circuit Court of the United

States, and that upon the judgment the writ of garnishment issued to said defendant. That the said writ of garnishment issued to said defendant, and was served on said defendant before the return day thereof, and was duly returned to said Court, and that the debt due from the said defendant on the said note was then and there placed in the custody of the law—and that the said garnishment and attachment are still pending and undetermined in the said Circuit Court of the United States. All of which he is ready to verify—wherefore he prays judgment of the writ, and that the same may be quashed. Appended to the plea is an affidavit of its truth.

To this plea the plaintiff demurred, and the Court sustained the demurrer; and thereupon the defendant pleaded the general issue, and verdict and judgment for the plaintiff, from which this writ is prosecuted.

The defendant now assigns for error, the judgment of the Court on the demurrer to the plea.

The plaintiff in error filed a written argument, insisting that the plea in abatement was sufficient to oust the jurisdiction of the State Court until the garnishment in the United States Court was decided. He cited 13 Peters, 151; 1 Wheat. 216; 12 Peters, 102; 5 Johnson, 100; 9 Id. 221.

Lessesne, contra. He insisted that the plea was bad, but if not, the question had in effect been determined by this Court in the case of Cook v. Field, 3 Ala. Rep. 53.

ORMOND, J.—We think it perfectly clear, both upon principle and authority, that the matter of this plea is good in abatement. The attaching creditor by the service of the garnishment has acquired a *lien* on the debt in the hands of the defendant, and we must presume that the Circuit Court of the United States having acquired jurisdiction over the subject, will enforce the prior right, which the plaintiff in the attachment has acquired by the levy of the garnishment, even if this Court should disregard it. As it is not certain that the plaintiff in attachment will be able to enforce his *lien*, the pendency of the attachment does not bar the prosecution of a suit by the original creditor against the garnishee, but merely suspends his right of action until the attachment is determined.

In Embree v. Collins, 5 Johns. 101, the defendant to an action by the original creditor in New York, pleaded in abatement an attachment pending for the same debt in Maryland, and the Court held the plea good. The same doctrine was affirmed in 9th Johns. 221; and in Brook v. Smith, 1 Salkeld, 280. See also Com. Dig. Attachment H, 719.

The case of Cook v. Field, 3 Ala. R. 53, is relied on by the plaintiff's counsel as decisive of this case against the plea. The point there decided is that an unsatisfied judgment against a garnishee cannot be pleaded in bar of a suit afterwards brought by the original creditor, and the argument is, that if a judgment will not operate as a bar *a fortiori*, a suit which is only proceeding to judgment, will not suspend the creditor's right to proceed for the recovery of his debt. The principle of that decision is, that an unsatisfied judgment against the garnishee is no bar because it may never be enforced—the attaching creditor having the right under our attachment law to enforce the collection of his debt either against the garnishee or the original debtor; the unexecuted judgment therefore is no bar. But the garnishee before judgment obtained against him has not the right to discharge himself, by paying the debt on which he is garnisheed; and as the garnishment is a *lien* upon the debt he owes the original creditor, which when reduced to judgment will be conclusive against him, if he cannot be protected by pleading the suit pending, he will have to pay the debt twice, without any fault of his, a result which could not be tolerated.

Although it is a clear right in the garnishee to plead in bar an executed judgment against him, or in abatement, a garnishment pending for the same debt, when sued by the original creditor, great strictness has always been required in the plea, and for most obvious reasons. The rights of the creditor ought not to be impaired, unless it is clearly shown that his debtor, the garnishee has been legally compelled to pay the debt to another. For these reasons, it is held to be necessary that the plea should show the proceedings at large, that it may be seen that the right to attach the debt existed, and that the custom, or attachment law has been strictly pursued. See the authorities to this effect collected in 1st Com. Dig. Attachments, I, 727. In Morris v. Ludlane, 2 H. B. 362, it was held, that

it was necessary to aver in the plea, that the defendant in attachment was indebted to the plaintiff within the City of London, as this was necessary under the custom of the City to authorize the attachment. Indeed, such are the difficulties attending the plea, that it is considered imprudent to plead the matter specially in bar, when it may be given in evidence under the general issue, as is the case when the action is assumpsit. See the note to Turbill's case, 1 Saunders, 67.

The plea in this case is bad, because it does not show that the Circuit Court of the United States had jurisdiction to issue the garnishment. Waiving all consideration of the question, that it is not averred in the plea that the Circuit Court had jurisdiction to render a judgment against David Jones, the assignor of the plaintiffs, and also whether the Courts of the United States can issue process of garnishment upon their judgments—to give the Court jurisdiction, it should have been averred in the plea, that the affidavit was made, which is the authority for issuing the process under the statute of this State. [Clay's Dig. 259, § 1, 2.] A judgment creditor has not the right as a consequence of his judgment to sue out garnishee process, but to entitle him to it, must make the affidavit which the statute requires. The necessity for this averment, is more apparent, when we consider that the process is not issued by a judicial officer, but *ex parte* by the clerk of the Court, on the application of the plaintiff, and if any intendment in favor of the regularity of the proceedings could be indulged in, which we have seen is not allowed in such a plea as this, it could not be made in favor of a mere ministerial act such as this is. It was therefore necessary that the plea should have contained an averment that the proper affidavit was made, without which the Court had no jurisdiction.

Again, it should have been averred in the plea, that the entire debt was attached, if such was the fact, and if not, what portion thereof. This could only appear in such a case as this by the record of the judgment, on which the attachment issued, or at least by the averment of the amount recovered. The writ of garnishment merely requires the garnishee to appear and answer what he is indebted to the defendant in attachment; it affords no information whatever as to the amount claimed from the defendant in attachment. The averment

therefore in the plea, that the debt was attached by the service of a garnishment, does not show that the entire debt was attached, it may be but a small portion thereof. There may be other objections to the plea but these are sufficient to show that the the plea is bad, and that the demurrer to it was correctly sustained.

Notwithstanding, it is certain that an attachment pending, may be pleaded in abatement, against a suit by the creditor, for the same debt. We think the garnishee has the right, and it would be the most convenient practice, to apply to the Court in which such suit is pending for a stay of proceedings, until the attachment suit is determined; which it would be the duty of the Court to allow, upon being certified of the fact of the pending attachment for the same debt. And, notwithstanding, an omission to plead the fact in abatement, or an ineffectual attempt to do so, it would still be the duty of the Court upon the application of the garnishee, to stay the issuance of execution until the attachment is determined, upon a satisfactory indemnity being executed by the garnishee.

See the case of Fitzgerald v. Caldwell's Executors, 4 Dall. 251, where that course was pursued in a similar case. Let the judgment be affirmed.

RAKE'S ADM'R, v. POPE.

1. That provision of the statute of frauds, which declares that a defendant shall not be charged "upon any agreement which is not to be performed within the space of one year from the making thereof;" unless the promise or agreement, or some memorandum or note thereof, shall be in writing, signed, &c. does not apply to a contract wholly executed on one side, and where nothing remains to be done on the other, but to pay the money stipulated as an equivalent: and this although by the agreement, the money was not to be paid until after the expiration of the year.
2. A plea which affirms that the contract for the breach of which the action is brought was not seriously entered into, and if was, it was not intended to be operative, is not obnoxious to the objection of being argumentative.

3. *Semble*—the plaintiff cannot object on general demurrer that a plea is argumentative, or that it amounts to the general issue; according to the English practice he should demur specially.

4. Where the defendant pleads two pleas, each of which tolerates the admission of the same evidence, if a demurrer is improperly sustained to one, the judgment will not be reversed on error, because the error could not possibly work an injury.

5. Where the defendant relies upon the adjudication of the matters in controversy in a former suit, as a bar to the action, he is not confined in his defence to proof by the record alone, but he may show by extrinsic proof what particular matters were litigated between the parties, provided the matters were within the issue tried in that suit.

6. The plaintiff brought his action, as alledged in the declaration, for the recovery of the last of three instalments, agreed to be paid as the purchase money, for certain property sold to the defendant by him: it was pleaded by the defendant that the plaintiff had previously sued him for the two former instalments, and that he had defeated a recovery, upon proof that the contract sought to be enforced had never been entered into by him: *Held*—that the plea was good, and if supported by proof entitled the defendant to a verdict and judgment.

Writ of error to the Circuit Court of St. Clair.

This was an action of assumpsit brought by the intestate of the plaintiff in error against the defendant, for the recovery of the price of a stallion, (named Cicero,) which he had previously sold and delivered to him. The declaration contains five counts, in some of which, the sum of two thousand dollars, is alledged to be the last instalment of the purchase money sought to be recovered; in others, five thousand dollars is alledged to be the price, and this sum the plaintiff claims.

The defendant pleaded 1. *Non assumpsit.* The 2d, 3d, 4th and 5th pleas, each, specially alledge with some immaterial variations, that the intestate had before impleaded the defendant for the non-performance of the identical promises and assumptions in his declaration mentioned; that an issue was made up involving the fact and validity of these promises and assumptions; that a trial thereof was had by a jury, who returned a verdict in favor of the defendant, and judgment was rendered thereupon, that the defendant go hence and recover of the plaintiff his costs. This judgment it is averred is in full force, not in any manner reversed, &c. 6. This plea denies that such sale as is alledged in the plaintiff's declaration, was made seriously and in earnest, and avers that if any sale was in fact made, it was a mere sham, not intended

to be binding between the parties, &c. The plaintiff demurred to the 2d, 3d, 4th, 5th and 6th pleas, and his demurrers were overruled.

Issues were joined on the first and sixth pleas: the plaintiff replied to the second, third, fourth and fifth, denying that the cause of action heretofore tried, was identical with that now sought to be enforced. To these replications the defendant demurred, but his demurrers were overruled; thereupon issues were joined, and the cause submitted to the jury, who returned a verdict in favor of the defendant, and judgment was rendered accordingly.

On the trial the plaintiff excepted to the ruling of the Circuit Judge. It appears that there was proof tending to show, that in October, 1837, the intestate sold and delivered to the defendant the stallion described in the declaration; for which the defendant promised to pay him five thousand dollars, as follows, viz: One thousand on the 25th December, 1837; two thousand on the 25th December, 1838; and two thousand on the 25th December, 1839. This contract was merely verbal, no note or memorandum in writing being made thereof. There was also proof tending to show that there was no contract between the parties, but the whole matter was a sham.

There was also proof that an action had been commenced, prosecuted and determined in Benton county upon the contract in question. That the special counts in the declaration filed in that case, were for the recovery of the first two instalments —the third not being due when the action was commenced. The common counts however were literal copies of those contained in the declaration in the present case. That cause was tried on issues formed upon the pleas of *non est factum* and *non assumpsit*, and the testimony and arguments of counsel, made that case to depend and turn upon the sole question of contract or no contract: *Further*—the jury found a verdict in that case in favor of the defendant; and judgment was rendered accordingly. It was also shown that the special contract now declared on, was proved on the trial of the suit in Benton.

Upon this evidence, the Court charged the jury, that if they believed that the contract was oral, and no note or memorandum of it was made in writing, and by its terms it was not to be performed, that is, if the instalments sued for was not to be

paid within twelve months after the contract was made, then it was within the statute of frauds, and could not be the foundation of a recovery. *Further*—that there could not be a recovery on the common counts, if an action had been determined between the same parties on the same contract, the declaration having common counts identical with those in the present case.

The defendant prayed the Court to give to the jury several charges, which were refused; but as these can have no influence upon the instructions given, and the defendant had a verdict and judgment, they need not be more particularly noticed.

S. F. Rice, for the plaintiff in error. The contract was executed on the part of the intestate of the plaintiff, by the sale and delivery of the stallion to the defendant, and the latter cannot object that he was not to complete the payments within twelve months thereafter. The statute of frauds does not apply to a complete sale, but only to an agreement for a sale which is not to be perfected within twelve months. [3 Ala. Rep. 679; 1 Taunt. Rep. 458; 1 East's Rep. 192; 7 East's Rep. 558; 21 Pick. Rep. 384; 13 Id. 1; 11 East's Rep. 142, 152; Chitty on Con. 209.]

The sixth plea is argumentative, and should have been held bad on demurrer. [1 Ala. Rep. N. S. 429.]

The trial in the former action, could have no effect upon the plaintiff's right to recover for the third instalment of the purchase money claimed; nor is the charge in respect to the judgment in that case barring a recovery upon the common counts consonant to law. The record of a former suit must be a complete bar in itself, and cannot be aided by other evidence. [2 Johns. Rep. 24; 7 Id. 20; 2 Wend. Rep. 369, 374; 12 Id. 504; 4 Conn. Rep. 276.]

W. P. Chilton, for the defendant. Part performance of an agreement will not take a case out of the statute, when the agreement is not to be performed within twelve months. [11 East. Rep. 142.] The meaning of the statute of frauds, is, that its execution must be perfected within the year. [Chitty on Con. 208.]

It is the same cause of action where the same evidence will support both actions. [7 Johns. Rep. 20; 8 Id. 383.] The for-

mer recovery in this case necessarily involved a decision upon the contract. [5 Wend. Rep. 161; 9 Id. 287.] If the plaintiff had recovered for the instalments first accruing, his right to recover for the third would not have been thereby affected; but being defeated in his first suit either by failure to show a contract, or proof of its invalidity by the defendant, he cannot maintain the present action.

COLLIER, C. J—The first section of the statute of frauds, among other things enacts, that no action shall be brought whereby to charge the defendant, "upon any agreement, which is not to be performed within the space of one year from the making thereof; unless the promise or agreement upon which such action shall be brought, or some memorandum or note thereof, shall be in writing, and signed by the party to be charged therewith, or some other person, by him thereunto lawfully authorized." [Clay's Dig. 254, § 1.] It has been held, that this provision extends to all contracts, which are not to be carried into full, effective and complete execution within the time limited by it; and on this the defendant's counsel founds the argument, that a sale and delivery of property, is not sufficient to exempt a case from its influence, unless full payment is to be made by the purchaser within the year. [Chitty on Con. 57, and cases there cited, 4 Am. ed.]

The statute was never intended to embrace a contract wholly executed on one side, where nothing was to be done on the other, but to pay the money stipulated as an equivalent. Speaking of the contract of sale, Chitty, in his treaties on contracts (58) says, "that a parol contract for the sale of goods to be delivered, which the parties reasonably expected would be delivered within a year, though the price was to be paid after that period, is not within the statute; because in such case, *all that is on one side to be performed*, namely, the delivery of the goods, is to be done within a year." In Donellan v. Read, 3 B. & Ad. Rep. 899, the Court lay down the law in equivalent terms, and add, "in case of a parol sale of goods it often happens that they are not to be paid for in full, till after the expiration of a longer period of time than a year; and surely the law would not sanction a defence on that

ground, when the buyer had the full benefit of the goods on his part." Such also was the opinion of Abbot, C. J. in Bracegridle v. Heald, 1 B. & Ald. Rep. 727. See also Holbrook v. Armstrong, 1 Fairf. Rep. 31.

In the present case, there was evidence tending to show the sale and delivery of the horse described in the declaration, for which the defendant agreed to pay by instalments. The two last of these were payable more than twelve months after the sale; and the court charged the jury, that if the instalment for which the action was brought, was not to be paid within twelve months after the contract was made, then the statute of frauds would not allow the plaintiff to recover. This instruction supposes that a delivery of the horse would not relieve the case from the influence of the statute. In this we have seen that the Court misapprehended the law.

The sixth plea is not argumentative in any just sense; it merely denies that any such contract as alleged in the declaration was seriously entered into, and that if it was made in fact, it was not intended to be operative. This latter remark is not an argument to show how what precedes it, is true, it is a reiteration in different terms of its truth. But if the plea were argumentative would it be bad on general demurrer, (which under our statute is its only effect, no matter in what form it may be interposed)? [2 Saund. on Plead. & Ev. 722.] At most the plea amounts to the general issue, or rather tolerates the admission of evidence that could be offered under *non assumpsit.* If it be of the former description, it would only be objectionable on special demurrer, which is not here permitted, as we have already said; and if of the latter, the plaintiff has not been prejudiced by overruling his demurrer; for the general issue *alone* would throw upon him the proof of every fact, which is required both by it and the sixth plea. So that it is wholly immaterial whether this plea is good or not; neither party has been in any manner affected by the judgment sustaining it.

There are some few cases that maintain the doctrine, that the record of a former suit must (if at all) be a bar in itself to a subsequent action, and that extrinsic evidence is not admissible to show what particular matters were litigated between the parties. But the great preponderance of American au-

thority is in favor of the admission of parol evidence, to show what transpired upon the former trial, and thus explain the record. In Parker v. Thompson, 3 Pick. Rep. 429, it is said, "Every fact which exists on record, must be proved by the record; but when the question is as to the real subject matter of a suit, or to show a bar to another suit, or to lay the foundation of an action of indemnity, the identity of the cause of action may be proved by other than record evidence." Whether any matter has been tried between the same parties, and decided before, is a fact depending in part on parol evidence, and partly on the record. And this is said to be the doctrine in England no less than in this country. [See the cases collected in 3 Phil. Ev. 837 to 840, C. & H.'s notes.] The case of Davidson & Stringfellow v. Shipman, et al. at the last term of this Court, considers the doctrine at some length, and attains the conclusion we have expressed. [See also Robinson v. Windham, 9 Porter's Rep. 397.]

The issue in the previous suit always shows what matters might have been litigated between the parties, and where the judgment therein is relied on as a bar, it is competent to show what were the points there controverted, and prove them to be identical with those involved in the case in hand. Matters that were not within the issue, although they were litigated in fact, are not available as a bar to a subsequent action, in which they are drawn directly in question. In fact, it is not permissible to show that any such matter was controverted in the first suit, for this would be to add to, or contradict the record, instead of assisting or directing its operation by other evidence. [Manny v. Harris, 2 Johns. Rep. 24.]

In the case at bar under the issue in the first suit, it devolved upon the plaintiff, if he would recover any part of the purchase money upon a sale of the stallion by a parol agreement, to establish the contract. The pleadings were adapted to the admission of such proof, and the evidence recited in the record informs us, that the sole question on which the determination of that case turned, was, whether there was such a parol contract. This being the case, it will follow from what we have said, that the bar set up by the defendant will avail him, unless the fact, that this action is brought for the recovery of an instalment which matured subsequent to the commencement

of that suit, will take it without the effect of the judgment there rendered.

In Gardner v. Buckbee, 3 Cow. Rep. 120, two notes had been given upon the purchase of a vessel; one of the notes had been put in suit, to which the defendant pleaded the general issue, and gave notice of a total failure of consideration, because of fraud in the sale, and on that ground succeeded in his defence. Afterward the second note was prosecuted, and on the trial the defendant offered in evidence the record of the former suit. The Supreme Court held, that the record with proof *aliunde* that fraud in the transaction was the ground upon which the verdict was founded, were conclusive against the plaintiff. It is said that "by the finding of the jury both propositions are affirmed. The judgment became conclusive between the parties on these points, and is an effectual bar to the action to recover the residue of the consideration money." So Burt v. Sternbergh, 4 Cow. Rep. 559, was an action of trespass, *quare clausum fregit*, in which the defendant claimed title to the premises. The plaintiff offered the record of a former suit for a trespass upon the same premises, in which the plaintiff had recovered, and accompanied it with parol evidence, to show that the defendant on that occasion set up the same title relied on by him in the latter suit. It was decided upon the Circuit as well as in the Supreme Court, that the record and evidence *aliunde* were conclusive as to the point of title; and in respect to that title the recovery and evidence were conclusive. It was however admitted that the defendant might have shown if he could, that he had acquired title since the former trial, or any title other than that which had been then passed upon. True, in Jackson v. Wood, 3 Wend. Rep. 27, the Supreme Court of New York, without particularly noticing their previous decisions, held that evidence *aliunde* was inadmissible to assist the record of a former action, so as to show what came in question on the trial. But this decision was reversed by the unanimous judgment of the Court of errors. [8 Wend. Rep. 9. See further, Lawrence v. Hunt, 10 Wend. Rep. 80; 3 Phil. Ev. C. & H.'s notes, 844.] From this view, it results, that the Court laid down the law correctly in the second charge to the jury. But we cannot know that the jury were influenced in finding a verdict by the

evidence upon this point. It may be that their finding was induced by the first instruction, which we have seen was erroneous; for that error the judgment of the Circuit Court must be reversed and the cause remanded.

DURDEN v. BARNETT & HARRIS.

1. A father may sue in case for an injury done to an infant child (then living with and engaged in his service) by dogs, permitted by the defendants to run at large, after a knowledge that such dogs were accustomed to bite mankind.

Writ of error to the Circuit Court of Montgomery County.

ACTION in the case by Durden against Barnett & Harris. The declaration avers that the defendants wrongfully and injuriously did keep, and carelessly and negligently did permit certain hound dogs, from ten to twenty in number, to run at large, well knowing the said hound dogs then were used and accustomed to attack and bite mankind: which said hound dogs afterwards, and whilst the defendants so kept the same as aforesaid, did attack and bite one J. S. D., an infant son of the plaintiff then living with and engaged in his service, *per quod servitiam amisit;* and was also put to great expense, to wit, five hundred dollars, in the necessary healing of the said J. S. D. The defendants demurred, and the Court gave final judgment thereon in their favor. This is the only error assigned.

COCKE, for the plaintiff in error, cited 3 Black. Com. 141–2, notes 27, 29; 1 Chitty's Plead. 50; Bac. Ab. 594, title Master and Servant; Cro. El. 55, 770; 3 Coke 38; Weedon v. Timbrell, 5 Term, 357; 5 East. 45, 221; Hall v. Hallender, 4 B. & C. 460; Trimble v. Spiller, 7 Monroe.

HARRIS, contra.

GOLDTHWAITE, J.—There can be no question, at this day, that an action on the case is the proper remedy when an

injury has been sustained from the act of any mischievous animal. [1 Chitty's Plead. 137.] So also it is the proper action to redress an injury to the relative rights of individuals: at all events where the act causing the injury is not accompanied with force. [Ib. 139.]

It is said the owner of domestic animals, not necessarily inclined to commit mischief, such as dogs, horses, &c., is not liable for an injury committed by them, unless it can be shown that he previously had notice of the animals mischievous propensity; or, that the injury was attributable to some neglect on his part. [Smith v. Pelah, Strange, 1264; Burk v. Dyson, 4 Camp. 198.] From this it would seem to follow that it was necessary to alledge and prove a *scienter*.

We have examined the declaration demurred to, and find it is alledged that the animals causing this injury, were accustomed to bite mankind; that this propensity was known to the defendants; and that, notwithstanding, they so negligently kept them that the injury resulted. This we should consider as entirely sufficient, if the suit was for the redress of a personal injury. The same rule applies when the action is for an injury to the relative right of the father, who must be considered as entitled to the services of an infant child residing with him. Even if the child was of very tender years, so as to be incapable of rendering any useful services, the action would doubtless lie, if averments were made of consequential injury, by expenses caused in healing the wounds; and perhaps, also, for the deprivation of its society.

Judgment reversed, and cause remanded.

LAMKIN, ET ALS. v. REESE, ET ALS.

1. Where one purchases land at a sale made by order of the Orphans' Court, and goes into possession, and remains in possession for two years, exercising ownership over it by cultivation, and clearing the timbered land, &c.,—he cannot rescind the contract, although the Orphans' Court had no jurisdiction to direct the sale, unless the heirs are unable or unwilling to make a good title to the land.

2. Where a mistake has been made in the decree of the Orphans' Court, as to the description of the land intended to be sold, which mistake is continued in the advertisement of the commissioners, the contract cannot be rescinded for that cause, if the purchaser was not deceived thereby, but got the land he intended to purchase, and the Court and the commissioners intended to sell. Nor will a bill in Chancery be entertained to correct the mistake, unless upon application to those having the power to rectify it, they refuse to do so.

Error to the Chancery Court of Lowndes County.

The bill was filed by the plaintiffs in error, and alledges that Edward Lassiter died seized and possessed, among other lands of the N. W. quarter of Section 21, T. 15, R. 14, and that Geo. M. Reese, was administrator on his estate. That James Taylor, in right of his wife, who was a daughter of Lassiter, presented to the Orphans' Court a petition for the sale of the lands for the purpose of distribution, upon the ground that a sale would be more advantageous to the heirs than a division—in which petition the lands are correctly described.

That in the order of the Orphans' Court directing a sale, and in the advertisement of the commissioners, the lands are correctly described, except that the land in section 21, is described as being in section 20—that the lands sold by the petitioners were the same as described in the petition.

That the complainant Lamkin purchased the lands at the sale, and gave his notes with security, for the purchase money, and after occupying the same for about two years abandoned the possession, and gave notice to the administrator that he rescinded the contract on account of the irregularties in the County Court, and demanded his notes, upon which the administrator has brought suit. The prayer of the bill is for a rescission of the contract, and for an injunction to the action at law.

The commissioners in their answer admit the allegations of the bill, but say that under the order of sale they sold all the real estate of the deceased, a part of which was the N. W. quarter of section 21—that the sale took place on the premises —that Lamkin was present, saw the order of sale, and knew that all the real estate of Lassiter was then sold—that the Orphan's Court directed them to execute a deed for the land, and to deliver the notes to the administrator. That they informed Lamkin that they were ready and willing to execute a deed

for the land, and afterwards tendered him one, in which the lands were truly described.

The administrator answers to the same effect, and insists that the misdescription of the land in the order was a mere clerical mistake. That Lamkin has greatly injured the lands, and has executed a mortgage thereon to the Bank, to secure the payment of a large debt. That the heirs of Lassiter are willing to join in a conveyance to Lamkin, and that he is able and willing to secure and indemnify him for a fee simple title. That when he was about making a final settlement of his administration, and dividing the notes among the distributees, he advanced his own money and retained these notes at Lamkin's request, who said they were as good as cash.

The answers conclude with a demurrer to the bill.

The heirs of Lassiter who were not made parties to the bill, filed a cross bill to obtain a discovery in the support of the defence, and to have the mistake in the misdescription of the land amended.

Testimony was taken on both sides.

At the hearing the Chancellor dismissed the cross bill, with the assent of the complainant, and dismissed the bill of the complainant, with costs, which is now assigned as error.

Elmore and Cook, for the plaintiff in error insisted, that the the sale was absolutely void, for want of jurisdiction in the Orphans' Court. That the Orphans' Court can acquire jurisdiction in no other way than by petition in the mode pointed out by the statute, and that the petition under which the land was sold in this case is not authorized by either of the statutes empowering the Orphans' Court to sell the land of a deceased. That as the Court did not obtain jurisdiction, the title is still in the heirs, and although they may on arriving at age ratify the the sale, the complainant is not bound to wait that result, or incur that risk. [9th Porter, 675; 4 Ala. Rep. 21.]

They also cited 1 Ala. Rep. 273, 709; 3 S. & P. 367; 2 Ala. Rep. 712, 113, 636; 3 Id. 406.

R. Saffold and Bolling, contra—maintained that the Court had jurisdiction—that the fact that the petition was filed by one of the heirs and not by the administrator, who was also a party to the proceeding, was at most a mere irregularity, and

could not be taken advantage of collaterally. [6th Porter, 219, 262; 1 Ala. Rep. 732.]

If the bill be true, the complainants had a full and adequate remedy at law.

The bill is defective because the heirs are not parties. To rescind a contract the parties must be put in *statu quo.* That cannot be done in this case because of the injury to the land, and also because of the mortgage, which complainant has given upon it. [4th Porter, 384; 3 Am. Com. Law, 405; 1 Story's Eq. 254; 2 Peere Williams, 619; 2 Bibb, 52.]

ORMOND, J.—The argument of the counsel for the plaintiff in error, has been mainly directed to establish the position that the decree of the Orphans' Court for the sale of the land, which the complainant purchased was absolutely void. That for the cause assigned for the sale of the land in the petition to the Orphans' Court, the personal representative of the deceased, should have been the actor, and not as in this case one of the heirs. We shall decline the examination of this question, because, conceding the argument to be true, the bill is fatally defective.

The entire purpose of the bill is to rescind a contract for the purchase of a tract of land, at a sale made by commissioners appointed by the Court. Notes were executed for the purchase money, and possession of the land taken and kept by the complainant for upwards of two years; during which time he exercised ownership over it by clearing a considerable portion of the timbered land, and it was not until after the lapse of more than two years, and suit brought for the purchase money, that this bill is filed for a rescission of the contract.

If it be true, as supposed, that from want of jurisdiction in the Orphans' Court, the title of the heirs was not divested by the sale, it by no means follows, that the complainant may at his pleasure rescind the contract. He has sustained no injury, if he can now obtain the title, whilst on the other hand, the injury to the heirs may be irreparable, if the contract can thus be arbitrarily rescinded by one of the parties to it. Nor is it an unimportant element in the consideration of this question, that this was a judicial sale; that the authority of the commissioners to sell was matter of record, and that the complainant, in

the absence of fraud, which is not alledged, must be presumed to have knowledge of the facts; and if, in truth, as alledged in the bill, he was ignorant of the irregularities in the proceedings of the Orphans' Court, it will not avail, as it was his duty to inform himself before he purchased. Whatever, therefore, may have been his right to a rescission of the contract upon this ground, if a seasonable application had been made for that purpose, no such right exists, after such a lapse of time, and where the interests of the heirs might be so materially affected thereby, unless the heirs were unable or unwilling to make title. As already observed, the object of the bill is not for a rescission of the contract if the title is not made, but in this aspect of the case, it is framed upon the supposition, that although the heirs may now be able and willing to make the title, that the complainant may at this distant period abandon the possession and rescind the contract.

The heirs are not made parties to the bill, but it appears from the record that they filed a cross bill, in which they offered to affirm the contract and convey the title. This bill the Chancellor, with the consent of the complainant, dismissed, upon the ground that as the heirs were not parties to the original bill, they could not file a cross bill.

It is also alledged in the bill, that although the lands of the deceased were correctly described in the petition to the County Court, that in the decree of the County Court for the sale thereof, and in the advertisement of the commissioners, it was incorrectly described—a part thereof being described as being in section *twenty*, instead of section *twenty-one*. It is admitted in the bill that Lassiter, the deceased, died *seized* of the lands as described in the petition. The sale, it appears, was in fact made upon the tract lying in section twenty-one—that no one was deceived by the mistake in the decree of the Court, and in the advertisement of the commissioners. That they supposed they were selling, and the complainant supposed he was purchasing, the land lying in section twenty-one, which was the land designed to be sold, and of which it appears he went into possession.

The fact that there was a mistake made in describing the lands intended to be sold, does not of itself give a Court of Chancery jurisdiction to correct the misdescription of the lands,

if that was the object of the bill. Before a Court of Chancery will entertain a bill for that purpose, it must be shown that application has been made to the opposite party to rectify the mistake, and that he refused to do so. This was explicitly declared in Long & Long v. Brown, 4 Ala. Rep. 622.

Nor is it any ground for rescinding a contract for the sale of land, that it is not correctly described in the contract, the vendee having obtained possession of the land he intended to purchase, and the vendor being able and willing to correct the mistake, and make a title to the property. [Evans v. Bolling, 5 Ala. Rep. 550.]

It is quite obvious from the frame of the bill, and all the facts of the case, that the object of the bill is not to quiet the title, but to get rid of the contract. This was the view taken by the Chancellor, and we fully agree with him in opinion, that he is not entitled to the aid of Chancery to rescind the contract. The decree is therefore affirmed with costs.

J. W. & R. LEAVITT v. SMITH, ET AL.

1. The plaintiff's execution was levied by the sheriff and a claim of property interposed by a third person, and bond with surety given to try the right, pursuant to the statute; the plaintiffs moved to dismiss the claim, which being overruled, a judgment for costs, was rendered against them, and a writ of error prosecuted to vacate the same; the judgment was reversed and the cause remanded, then on motion of the plaintiffs, the claim was dismissed: *Held*—that these proceedings did not amount to a waiver, (upon the ground of election or otherwise,) of the summary remedy against the sheriff for neglect in failing to make the money on the execution.
2. A sheriff who has begun to do execution, should proceed therein, and having levied it, the common law requires that he should sell the goods, even after the return day, although he may have been superseded by his successor; and he is not excused for a non-performance of his duty by delivering the execution and goods to his successor, but he must sell them, or otherwise legally dispose of them. If by statute, a *venditioni exponas* is made necessary to sell the goods after the return day of the *fi. fa.*, he should at least accept it, when it is tendered him by the plaintiff.

3. Where the defendant in execution is in possession of property, the presumption is that he is the owner of it, and upon a motion against the sheriff for failing to make the money upon the execution, it devolves upon the latter to show that the property was not subject to levy and sale to satisfy the same.
4. It is competent for a sheriff when charged with neglect in failing to make the money on an execution, to prove that goods levied on by him under the impression that they belonged to the defendant, and afterwards released, were not the defendant's property; and consequently not liable to the satisfaction of the execution.

Writ of error to the Circuit Court of Coosa.

This was a suggestion under the statute, at the suit of the plaintiffs in error, against Smith, as the sheriff of Coosa, and the co-defendants as his sureties, alledging, that with due diligence a writ of *fieri facias* placed in the sheriff's hands, at the suit of the plaintiffs, against Jeremiah M. Friou's estate, could have been collected. The suggestion was traversed, and the issue submitted to a jury, who returned a verdict in favor of the defendants. On the trial the plaintiffs excepted to the ruling of the Court. From the bill of exceptions it appears that the plaintiffs read to the jury the execution described in the suggestion, with the indorsment of its receipt by the sheriff, showing that the same was placed in his hands four days after it was issued; on which was the following return: "Levied on a stock of goods, consisting of dry goods, hardware, carriages, &c.—property pointed out by J. W. Pryor, plaintiffs' attorney, as the property of J. M. Friou, 1st February, 1840." It was further shown by the plaintiffs that the goods levied on, were worth about seven thousand dollars, that Friou had in his possession four negroes, worth eleven or twelve hundred dollars, while the execution was in force; and during the same time he levied on a house worth about five hundred dollars. A witness stated, that it was the general understanding that the goods, negroes, and house were at the time of the levy, in the possession of A. B. Dawson and Samuel Friou; though judging from what he saw, he should say they were in possession of the defendant in execution. Here the plaintiffs rested their case.

The defendants then read to the jury in despite of the plaintiffs' objection, an order of Court made at the Fall Term, 1840, permitting the sheriff to amend his return, as also the

return made under the authority thereof, as follows: "The above goods have been claimed by A. B. Dawson and Samuel Friou, as assignees of J. M. Friou, defendant in execution, and claim bond given to Wm. J. Campbell, now sheriff, my successor in office, September 12th, 1840, A. Smith, late sheriff."

It was proved by the defendants, that on the second day of the term of the Court, to which the execution was returnable, A. B. Dawson made an affidavit, that the property levied on, was not the property of the defendant in execution, nor liable to satisfy the execution, but the title thereto was vested in himself and Samuel Friou as assignees. To the admission of this evidence the plaintiff objected.

The defendant then offered as evidence a bond executed by Dawson and Samuel Friou, with surety, for the trial of the right of the property levied on, bearing even date with Dawson's affidavit. The plaintiffs objected to its admission for the following reasons: 1. It was the duty of the sheriff to have sold the goods, and the execution of the bond formed no excuse for the failure. 2. The bond was not approved by the defendant Smith, but by his successor in office. 3. The bond contradicted the return first made on the execution. But the objections were overruled, and the evidence admitted.

The defendants also read to the jury, notwithstanding the plaintiffs' objection, an entry of the Circuit Court, made at the Spring Term, 1840, showing that a motion then made by the plaintiffs to dismiss the claim of property, was overruled. They were also permitted to read an entry, stating that plaintiffs declined to make up an issue, to try the right of property, or to join in it, when tendered by the claimants, or in any manner to prosecute the case: thereupon, the Court adjudged, that the plaintiffs be nonsuit. They were allowed further to show that this judgment of nonsuit was reversed on error by the Supreme Court, and the cause remanded, with instructions to dismiss the claim, unless a good bond was executed.

The defendants then offered as evidence, an entry made at the Fall Term, 1842, showing that on plaintiffs' motion the claim was dismissed for the refusal of the claimants to execute a good and sufficient bond. To the admission of this the plaintiffs also objected. They also read to the jury a com-

mission from the Governor of this State, by which the defendant Smith was appointed sheriff of Coosa county, in the place of J. E. W. Logan, until the 22d day of February, 1840, when his term of office was to expire.

The defendants further read to the jury a receipt of his successor in office, signed the 27th March, 1840, for the goods &c., levied on by the plaintiffs' execution, and a receipt for their safekeeping by the keeper of a warehouse in Wetumpka, dated the 21st March, 1840. And they proved that the goods in question were delivered to Smith's successor before the return day of the execution in question, and even before the receipt was delivered.

It was then proved by the plaintiffs, that within ten days after the levy of their execution, they executed together with good and sufficient sureties, bond in the sum of ten thousand dollars, payable to the defendant Smith; conditioned to indemnify him against all damages he might sustain in consequence of a levy and sale under their execution. This bond was given upon the obligee's requisition for indemnity. The plaintiffs further showed, that on the 27th of July, 1840, they caused a *venditioni exponas* to be issued, requiring the sale of the goods levied on, which was offered to the defendant with instructions to execute its mandate, and with notice that in case of neglect he would be held liable. But he refused to receive the writ—stating that he was not in possession of the goods.

The plaintiffs thereupon prayed the Court to instruct the jury as follows:

1. If they believed that the defendant in execution had sufficient property in Coosa county, while the execution was in Smith's hands, and that he received the execution on the day indicated by his indorsement, then it was his duty to have made the money thereon before its return, and the claim interposed by Dawson and Friou, was no defence in the present case. This instruction was refused by the Court.

2. If the goods referred to in the original return of the defendant Smith, on the plaintiffs' execution, were of value sufficient to satisfy the same, their delivery to his successor before the return day of the execution, although his term of office expired, and the interposition of the claim on the second day of the next Court by Dawson and Friou, did not relieve

the defendants from liability; and they should find for the plaintiffs. This prayer was in like manner denied.

3. If the execution of the plaintiffs was placed in the hands of Smith at the date of his indorsement thereon, and from that time up to the day of its return, the defendant had sufficient property in Coosa county to satisfy the same; then the expiration of the defendant's official term, the proceedings under the execution, the claim of property, &c., (particularly summing up all the facts shown by the bill of exceptions to have been proved at the trial,) did not excuse the defendants from liability if the property levied on belonged to the defendant in execution. This instruction was also refused.

The questions arising upon the objections to the testimony, and the prayer for instructions, are all duly reserved.

J. W. Pryor, for the plaintiff in error. The irregular judgment of nonsuit, rendered against the plaintiffs on the claim of property interposed by Dawson and Samuel Friou, (although the Court went so far as to direct a delivery of the goods to the claimants,) cannot in any manner prejudice the plaintiffs' right to recover of the defendants. The order in respect to the goods was extrajudicial, and could neither give or divest rights. But if it was effectual for any purpose, it cannot be set up by the defendants, as the judgment of reversal entirely vacated it. [4 Ala. Rep. 335.]

The amended return made by the defendant Smith, was irregular and afforded no answer to the suggestion; because the claim of property was made after the return of the execution, and the bond approved by the sheriff's successor, instead of himself. So in respect to all the evidence objected to, it may be said to have been irrelevant, and for that cause inadmissible. [Bondurant, et al. v. Buford, 1 Ala. Rep. N. S. 359.]

The evidence clearly warranted the first and second instructions prayed; for it was shown not only that the defendant in execution was in possession of the property levied on, but of other property also. The third prayer merely asked the Court to charge the jury, that if the defendant in execution was the proprietor of sufficient property to satisfy the execution, which had been levied on, then they should find for the defendants. The principle here assumed cannot be denied.

Nothing that was done by the plaintiffs after their execution was delivered to the sheriff amounts to a waiver of their right to proceed against him. [23 Wend. Rep. 490–6; Id. 306–9; 4 M. & P. Rep. 790; 8 B. & C. Rep. 132; 15 Eng. C. L. Rep. 165.] The case of Rawson v. Turner, 4 Johns. Rep. 469, is unlike the present. There the plaintiff attempted to pursue a remedy, inconsistent with that he had previously prosecuted.

W. W. Morris, for the defendants. Whether the defendant Smith employed due diligence in endeavoring to make the money on the execution is a mixed question of law and fact. The mere omission to collect it, in the absence of all proof of negligence or malfeasance, does not entitle the plaintiff to recover in the summary proceeding which he has instituted. [1 Stew. Rep. 438.] Time was necessary to make an inventory of the goods levied on, so that they could not be sold at the expiration of ten days; and before the sheriff could make the necessary preparation to advertise and sell, his commission expired. Under the impression that his powers had ceased, he turned over to his successor the execution and the goods before the return day; and even if he was mistaken in this, yet the facts proved at the trial afford a sufficient answer to the suggestion.

Conceding that the sheriff was guilty of such negligence as to make himself liable, yet as the plaintiffs elected to proceed in the trial of the right of property against Dawson and Friou, they cannot now charge him upon a suggestion of negligence. [McElroy v. Mancius, 13 Johns. Rep. 121.]

As to the order of the Circuit Court upon directing the nonsuit, that the goods should have been delivered to the claimants, whether extrajudicial or not, the sheriff was bound to obey it, as the plaintiffs' did not supersede it by a writ of error bond.

The bond for the trial of the right of property though defective, was not so entirely null, as not to furnish a protection to the sheriff in delivering up the property. As to the tender of the *venditioni exponas* to the sheriff, it does not aid in making out the plaintiffs' case; if it proves any thing, it rather shows that they had elected to proceed against the goods.

The first charge prayed, stated the law correctly in a proper case, but the facts were not adapted to it. The other charges

were properly refused—they required the opinion of the Court upon a question of fact, which was properly referable to the jury.

COLLIER, C. J—It is insisted for the defendants, that if the Circuit Court erred in the admission of evidence, or in the refusal to charge the jury, the plaintiffs were not prejudiced, and cannot complain; because the proceedings upon the claim of property interposed by Dawson and S. Friou, amount to an election to pursue that remedy, and bars the motion against the sheriff for a failure to perform his duty. There is nothing in the record from which it can be inferred, that the plaintiffs were willing to proceed to the trial of the right of property, or had elected that case as a mode of making their judgment available. That was a procedure originated by the claimants under the authority of a statute, in order to prevent the sale of goods levied on, unless the right asserted by them, should be adjudged invalid. The plaintiffs could not control the interposition of such a claim, and if regularly made the sheriff was bound to allow it. The case then is commenced and placed upon the trial docket, without the agency of the plaintiffs, and under circumstances that show that they were entirely passive.

This being the condition of the claim of property, the plaintiffs moved the Court as soon as it was docketed, to dismiss it: this motion being overruled, they declined proceeding to trial, and a judgment of nonsuit with costs, was rendered against them. To reverse this judgment, they prosecuted a writ of error to this Court; and upon the cause being remanded they again moved for a dismissal for the defectiveness of the claimants bond: this motion was granted upon the refusal of the latter to perfect their bond. So far from all this showing an election to proceed to try the right of property, it rather indicates the reverse; else why ask the Court, whenever an opportunity presented itself, to repudiate that case? No adverse inference can be drawn from the prosecution of the writ of error by the plaintiffs. The reversal of the judgment of nonsuit could only have been sought for the purpose of relieving the plaintiffs from the payment of costs, and having the case so disposed of, as not to prejudice their rights.

But suppose the plaintiffs had voluntarily submitted to a trial of the right of property, and been unsuccessful, would this have availed the defendants as a bar to a remedy against him for neglect. In Baylis v. Usher 4 Moore & P. Rep. 791–2, Bosanquest, Justice, said, "a right of action once vested can only be destroyed by a release under seal, or by the receipt of something in satisfaction of the wrong done; and therefore the tenant does not waive his right of action for an excessive distress, though he enter into a written agreement with his landlord, respecting the sale of the effects seized." And in Willoughby v. Bockhouse, 4 Dowl. & R. Rep. 539, Bayley, Justice, said, there was no such thing as a man's waiving his right of action, when once a wrong had been committed. Mr. Justice Cowen, succeeds a quotation of this remark with the emphatic inquiry, "And indeed it may be asked, who ever heard of such a thing being held?" He also said, "Nothing is better settled than that, after an injury has beeen committed, the cause of action cannot be discharged by any act of the plaintiff short of a release, or acceptance of something in satisfaction." And this principle he enforces by the familiar case of the delivery to, and acceptance of goods by the plaintiff after the conversion or tort has been committed; in which it is held, that *trover* or *trespass* is not thereby bared. [Bowman v. Teall, 23 Wend. Rep. 309.]

In Ravenscroft v. Eyles, 2 Wils. Rep. 294, it was decided that an action upon the case, for an escape upon *mesne* process, was maintainable against the Warden of the Fleet, although the prisoner returned and submitted himself to custody on the same day, and the plaintiff proceeded to final judgment againt him, with a full knowledge of his escape.

It has been held, that where the plaintiff without a knowledge of the prisoner's previous escape, opposed his discharge under the act for the relief of insolvent debtors, he might, notwithstanding, maintain an action against the sheriff for the escape. [Dash v. Van Kleeck, 7 Johns. Rep. 477.] But where a plaintiff brings an action against the sheriff for an escape, he has elected to consider the prisoner as out of custody, and cannot oppose his discharge under the insolvent act. [McElroy v. Mancius, 13 Johns. Rep. 121.] So where a new sheriff receives a prisoner from his predecessor, who had pre-

viously made a voluntary escape, he is bound to keep him securely, and the plaintiff has his election to consider the prisoner in execution, and charge the new sheriff for an escape from him, or as out of custody, and charge his predecessor. If he has made his election, and prosecuted a suit to judgment against the latter, this is a bar to an action against the former. [Rawson v. Turner, 4 Johns. Rep. 469.]

The cases in which the election of a remedy against one person, will bar an action against another, are those in which the actions are inconsistent with each other, and the one last brought requires the proof of facts incompatible with the first; and which the latter impliedly affirms does not exist, or if they do exist, it waives the benefit of them. There is no incongruity in charging the sheriff with neglect of duty in not making the money on execution, after having moved the dismissal of a claim to property, on which the execution was levied. Such a motion, even if it recognized the case, and manifested a willingness to try it, or if there had been a trial in fact, would not waive the summary remedy for neglect, or affirm that neglect was not incompatible. How can the want of official diligence be expurgated by attempting to subject to the satisfaction of an execution, property on which the officer had levied. Such a proceeding merely affirms the liability of the property, but neither denies or excuses the neglect. The remedy then, against the sheriff is concurrent or at most cumulative, and remains unimpaired by the claim of property, whether tried or not.

A sheriff or other officer, who has begun to do execution may be compelled to proceed therein, and having levied it, it was his duty at *common law* to sell the goods seized, even after the return day; and this although he had been superseded (in the meantime) by a successor duly qualified. The law in this respect remains unchanged, *unless* it be to require a *venditioni exponas* to warrant the sale after the *fieri facias* has lost its energy. [Bondurant, et al. v. Buford, 1 Ala. Rep. 359.] The delivery of the goods, together with the execution to the defendant's successor, did not absolve the defendants from the obligation to sell or otherwise legally dispose of them. Having levied the *fi. fa.* it was his duty to provide for the safe-keeping of the goods, as they were not replevied, and if to authorize a

sale a *venditioni exponas* was necessary, (upon which we express no opinion) he should at least have accepted it when offered. If they had been replevied upon good security, or the claim of property had been regularly interposed upon affidavit and bond, then the defendant Smith, might have delivered the goods to the defendant in execution in the one case, and the claimants in the other: and such a disposition would have relieved him from the imputation of the want of due diligence in selling them.

Whether the claim made while the execution was in the hands of the defendant Smith's successor, was so interposed as to prevent the claimants from objecting to its irregularity, we need not inquire. We have already said that the goods were properly in his hands by the levy, and that he did not legally dispose of them. The evidence adduced by the defendant does not furnish an answer to the suggestion, or in any manner repel the presumption of neglect, which is inferable from the fact that the defendant in execution was in possession of property, a part of which had been levied on. In Minter v. Bigelow & Co. 9 Porter's Rep. 481, it was determined, that it would be presumed that a defendant in execution was the owner of property of which he was in possession; and that it devolved upon a sheriff, against whom a motion was made for failing to make the money on a *fi. fa.* upon a suggestion of a want of due diligence, to show that the property was not liable to its satisfaction. See also Robertson v. Beavers, 3 Porter's Rep. 385. No proof tending to such a conclusion was offered, and the inference as well upon the reason of the thing, as upon the authority cited was, that not only the goods, but the other property of which the defendant in execution was ostensibly possessed, were subject to seizure and sale.

The statute under which the present case was instituted enacts, that upon the failure of any sheriff or coroner to make the money on an execution, the plaintiff may suggest to the Court, that the money could have been made with due diligence; thereupon it shall be the duty of the Court forthwith to cause an issue to be made up to try the fact; and if it shall be found by the jury, that the money could have been made with due diligence, judgment shall be rendered against the sheriff or coroner, or his sureties, or any or either of them, for the sum of

money specified in the execution, with ten per centum, &c. as damages. [Clay's Dig. 218, § 85.] In Hallett v. Lee & others, 3 Ala. Rep. 28, it was held, that the defendants to the motion might plead to the suggestion any matter in excuse or avoidance, which would negative its truth. And we apprehend it would be entirely competent for the sheriff to show as well before as after levy that the money could not be made. The levy will not estop him from denying that the property seized was the defendants. In taking it, he merely affirms that he believes it is subject to the execution, and when charged with the want of diligence, it is incumbent on him to show that he was mistaken.

The facts proved by the defendants we have seen, were in themselves immaterial and made out no defence; they should consequently have been excluded. But being admitted, when taken in connection with the evidence offered by the plaintiffs, a sufficient foundation was laid for the instructions asked; and they should have been given to the jury. The consequence is, that the Circuit Court erred; its judgment is therefore reversed and the cause remanded.

MORGAN v. PATRICK & SMITH.

1. An action in the case and not assumpsit is the proper remedy where the purchaser has accepted a deed for lands, and he has been defrauded by the omission to inform him of an outstanding incumbrance created by the vendor.
2. The admissions of a party are not evidence either of the conveyance of land, in another State, or that by the law of that State, judgments are a lien on lands. The rule is, that admissions, out of Court, will not establish deeds, records or statutes.

Writ of error to the Circuit Court of St. Clair County.

Assumpsit by Patrick and Smith against Morgan, on the money counts.

After the trial of the case, a statement of the facts proved before the jury, and the questions supposed to arise thereon, was made by the counsel of the parties, and substituted in place of a bill of exceptions. To make out their case, the plaintiffs proved by oral testimony, that they had paid the money sued for, to one Neal, in the State of South Carolina, upon a judgment obtained by him in that State against the defendant, and also gave in evidence a certified transcript of the record of the cause. The interest statute of South Carolina was given in evidence. The defendant objected to the record as irrelevant to the issue between these parties, and excepted to the opinion of the Court allowing it as evidence. The plaintiffs produced two witnesses who testified that, in a conversation held with the defendant before this suit was brought, he stated that the said Neal had recovered a judgment against him in South Carolina; that the defendant had a tract of land there at the rendition of the judgment; that he knew at the time that this judgment bound, or was a lien on his land; that after the judgment was so rendered against him and his land bound, he sold it to the plaintiffs; that they did not know of the judgment, and he did not tell them of it; that since he left the State of South Carolina, the plaintiffs had paid the said judgment, but had done it without his knowledge or consent. This was all the proof on these points, and nothing was in evidence as to the character of the conveyance made by the defendant to the plaintiffs, or whether any was made as above. The questions are, can the action of assumpsit be maintained on these facts? Is it competent to prove, that the defendant sold the plaintiff a tract of land in South Carolina, and that a judgment in that State bound the land, by the admission of the defendant as before set out; or, should higher evidence have been given? If there was error in admitting any of the evidence heretofore certified by the presiding Judge; or if the action of assumpsit cannot be maintained; or if the declarations of the defendant, as above stated, are secondary evidence, or are insufficient to show the sale of land, or that by law judgments in South Carolina bind land; in either of these events it was agreed, the judgment in this case should be reversed; if otherwise, it is to be affirmed.

W. P. CHILTON, for the plaintiffs in error, argued:

1. If the plaintiffs had a conveyance with covenants against incumbrances, they should sue upon that in accordance with the familiar principle, that assumpsit will not lie if the party have a higher security.

2. If he had no covenants, they have no right to charge the defendant for the amount paid in extinguishment of incumbrances. [Cullum v. Branch Bank at Mobile, 1 Ala. Rep. N. S. 21.]

3. The admissions of the defendant was no evidence, either as to the conveyance of lands, or to the lien of the judgment.

T. A. WALKER, contra.

GOLDTHWAITE, J.—1. We think it clear that the judgment in this case must be reversed, upon the statement agreed to by the counsel.

The principal question is whether the action of assumpsit is the proper one in the event that the case of the plaintiffs was made out by legal evidence. This action is allowed wherever there is an express contract, not under seal, to pay money or perform a duty, or where one can be implied from the circumstances in proof. [Chitty on Plead. 93.] In this case, according to the facts agreed upon, the defendant sold to the plaintiffs a tract of land, knowing at the time it was incumbered by a judgment of which the purchasers were ignorant. There is no question, but that this was a fraud upon the purchasers, for which they had a remedy, although there might be no covenants of general warranty, or against incumbrances. Whereever there is a deceit coupled with an injury, it is said an action on the case will lie—(Pasley v. Freeman, 3 Term. 31,)—and even where a warranty under seal is executed, it has been held in this Court, that an action may notwithstanding, be maintained upon the deceit. [Cozens v. Whittaker, 3 S. &. P. 322.] It is true, this was a case where the warranty and deceit was with respect to personal property; but the same rule is laid down as applicable to purchasers of land;—Cooper v. McLewry; Cooper, 308; 3 Coke on Litt. note, 381, a.—and is recognized in Cullum v. Branch Bank at Mobile,

4 Ala. Rep. 16. These citations, showing that an action on the case will lie on the fraud, whether there was or was not a covenant of warranty in the conveyance, are quite conclusive to prove that assumpsit is not the proper remedy in either case. In this case, however, it is impossible to know from the admissions of the party, whether the conveyance made by him was with or without covenant of warranty against incumbrances. If there was such a warranty it is clear that the party must resort to that, if he waives the deceit and proceeds upon the contract. [Dunn v. White, 1 Ala. Rep. 645.] Our opinion upon this part of the case is, that the action is misconceived and cannot be sustained under any proof of the facts stated.

2. We think it also very clear, that the admissions of the defendant were not evidence, either of the conveyance of the land by him, nor could they enable the Court to determine, that judgments in South Carolina are considered a lien upon lands. We must presume the common law to be in force until changed by statute; by this, a deed is necessary to convey the title to lands; by it also, we know that lands are not bound by judgments. The rule is, that admissions, out of Court, are not evidence to establish deed or records. [Hasbrouck v. Baker, 10 Johns. 19; Jenner v. Joliff, 6 Id. 9; Cloud v. Patterson, 1 Stew. 394.] And the same rule applies with greater force to statutes, which ascertain the rules of law, or give rights to individuals. [Willard C. Co. v. Hathaway, 8 Wend. 480; Rinaldi v. Rives, 1 Stewart, 174.]

The result of this examination is, that the judgment must be reversed, and the cause remanded.

HAYNES v. CRUTCHFIELD.

1. Where detinue is brought for the recovery of several articles, it is not necessary that the value of each should be separately stated in the declaration, but *generally* the jury should sever the value of each by their verdict.
2. It is sufficient to declare in detinue for a negro woman by name, without stating her complexion, age, &c.; for a cow, without describing her color, mark, brand, &c.; or for a certain number of knives and forks, without mentioning the maker's name, character of the handles, &c.
3. The Court may permit a party in a civil cause to challenge a juror at any time before the cause is submitted to the jury, although they may have been selected and sworn.
4. It is not error to permit to be read to the jury, a note in writing addressed by the plaintiff to the defendant, in detinue, before the commencement of the action, requiring the latter to deliver to the bearer the chattel, for the recovery of which suit is brought;—such evidence may be unnecessary, but it could not prejudice the defendant.
5. If the trustee or one of the creditors, in a deed for the benefit of creditors, be authorized to prescribe the day of sale, and the length of time for which it shall be advertised, the failure to notify any of the creditors of the time and place, does not warrant the inference that as to one of the creditors provided for, and who attended the sale and purchased the property, that the sale was fraudulent: and the grantor who assented to and was present at the sale, cannot upon that ground defeat an action by the purchaser for the recovery of the articles sold.
6. Where the sale of property which had been conveyed by deed of trust, was, under the powers conferred, expedited, (with the assent of the grantor,) so as to prevent the interference of some of his creditors, who were prosecuting their claims to judgment; the grantor when sued by the purchaser at the trust sale for property sold, cannot for that cause defeat a recovery.
7. An agreement between A. and B. that the former should become the purchaser of property, and allow it to remain with the defendant to re-sell and reimburse the plaintiff, and if, after such payment there should be an excess, the defendant should appropriate it to himself, does not make the plaintiff the defendant's agent.
8. The mere attempt of the purchaser of property at public sale to prevent a person from bidding for it, will not render the purchase invalid as against public policy; but to have this effect the attempt must have been successful.
9. The omission of the purchaser of property at a public sale to take possession thereof, will not prevent him from maintaining *detinue* against the former owner: actual possession by the plaintiff, not being essential to the maintenance of the action.
10. In detinue for a cow and calf and fourteen hogs, it is not error, if the jury assess an aggregate sum as the value of the cow and calf, and another sum as the value of the hogs.

Writ of error to the Circuit Court of Benton.

This was action of detinue by the defendant in error against the plaintiff. The declaration contains two counts, each of which charge the detention of a female slave named Betty, and others who are particularly named; also many articles of household furniture, plantation tools, stock, &c., which are described generally, by their respective numbers. To each of these counts the defendant demurred, but his demurrer being overruled, he pleaded the general issue, and the cause was thereupon submitted to a jury. On the trial, the defendant excepted to the ruling of the Circuit Judge.

The points presented by the bill of exceptions may be thus succinctly stated. 1. Each of the parties challenged three of the jurors composing the panel of twelve, and the jury was then completed by summoning the requisite number of talesmen, for that purpose. This being done, the plaintiff challenged another juror of the original panel; to this the defendant objected, but his objection was overruled, and the challenge allowed.

2. The plaintiff proposed to read as evidence to the jury a written request to which is appended a schedule of the property in question; this paper is subscribed with the plaintiff's name, was proved to have been read to the defendant, and requires him to deliver the property to Robert Porter. To the admission of this paper the defendant objected, but the Court overruled the objection, and permitted it to go to the jury with the instruction that it was to be regarded by them, only as the proof of a demand.

In 1839, the defendant executed a deed of trust to M. M. Houston, to secure debts owing to the plaintiff and other debtors; some of whom lived within, and others without this State. The deed did not prescribe a day of sale, but a time was agreed on between the plaintiff and defendant, as well as the notice to be given thereof; and the trustee in advertising and selling under the deed, as to time was governed by that arrangment, although some of the creditors had no notice, and consequently were not present at the sale. In adjusting the time of the sale the object was to avoid a large judgment against the defendant. The plaintiff bid off nearly all the property that was

sold; before, at and after the sale he declared he was buying the property for the defendant. Previous to the sale it was agreed between the plaintiff and defendant, that the former would buy in the property for the defendant, and permit it to remain with him to re-sell, and after paying the plaintiff his debt, to appropriate the residue to his own purposes. While the sale was going on, the plaintiff repeatedly endeavored to induce one of the creditors provided for by the deed to cease to bid for a negro woman. All the property bid off at the sale was then, has been, and still is in defendant's possession. There was evidence tending to show that the plaintiff bought the property in question for the defendant's use; and also that he bought it for the benefit of the tavern house, which had been sold the day before, under another deed of trust, made by the defendant to secure the plaintiff's debt, and bought by the plaintiff. The defendant was in possession of the tavern at the time of the sale, and has ever since retained it. Some of the property sold low, and some at a fair price.

The Court charged the jury that if there was fraud in the sale of the property sued for, the defendant could not avail himself of it as a defence in this action.

The defendant's counsel prayed the Court to charge the jury as follows: 1. If there was an arrangement between the plaintiff and defendant by which an advantage was secured to either of them, at the expense of the other creditors mentioned in the deed; that in consequence of such an arrangement, the sale was brought on without any notice to some of the creditors mentioned in the deed, and that some of these were not present thereat: and that the plaintiff induced any person present not to bid, in consequence of which some of the property was bid off by him at less than its fair value, then as to such property the sale was void and cannot be enforced.

2. If there was an arrangement between the plaintiff and defendant, by which an advantage was secured to either of them at the expense of the creditors of the latter, who are mentioned in the deed of trust, and in consequence of such arrangement, the sale was made in the absence of some of these creditors, and without notice to them, and the plaintiff induced any person not to bid; in consequence of all which, the property bid off by him did not bring a fair price; then the sale was void

and could not be enforced thus far, unless the property was delivered.

3. If the property bid off by the plaintiff was not delivered, and the sale was made unfair by his agency, then he could not recover the same.

4. If the property has remained in the defendant's possession without ever having been delivered to the plaintiff, and the latter purchased it at an under value by inducing the belief that he was buying it for the defendant, the plaintiff is not entitled to recover the same.

5. That the plaintiff might have been the agent of the defendant, although he received no consideration therefor.

6. If there was any fraud in the sale and the plaintiff was a participant therein, he cannot recover the property in question, unless the same was delivered to him: and the same consequences follow, whether the fraud was intended to effect the creditors or the defendant; or whether consummated, or merely purposed. Each of which charges were refused, and the jury returned a verdict for the plaintiff, on which judgment was rendered.

S. F. Rice, for the plaintiff in error. The declaration is defective, in not alledging the value of each article separately, and in seeking the recovery of property much of which cannot be identified. The judgment is also obnoxious to these objections. [2 Saund. Rep. 74, b.; 6 Com. Dig. 407, 2 x. 12.]

It was irregular to permit one of the original panel of jurors to be challenged after the jury had been completed by summoning talesmen.

The letter addressed by the plaintiff to the defendant, or at least a part of it, was inadmissible as evidence for any purpose, and should have been excluded, upon the ground that it was merely the declaration of a party, forming no part of a *res gestae*. [Brown v. Brown, 5 Ala. Rep. 508; Greenl. Evi. 224–5, note 2.]

If there was a fraud in the sale as against the defendant, or his creditors, or both, or if the plaintiff and defendant so combined as to enable the plaintiff to purchase at an under value, in either case the plaintiff could not avail himself of his pur-

chase, if he had never had possession. In the latter case, public policy would make it inoperative. [13 Johns. Rep. 112; Com. on Con. 53, 58, 133; Chitty on Con. 113, 222, 348, 225–7; 20 Johns. Rep. 397; 7 Wend. Rep. 276; 8 Johns. Rep. 253; 8 Porter's Rep. 351; 1 Ala. Rep. N. S. 34.] The defendant may set up fraud not only in the execution of the deed of trust, but in the sale under it. [16 Mass. Rep. 384; 3 Bibb's Rep. 177; 2 Pick. Rep. 184, 191, 199, 200; 18 Id. 95, 107.]

The proof does not show a delivery of the property in question to the plaintiff, but the reverse is inferable. It cannot be said that he was invested with a title without the possession; and if this was delivered, the defendant could not be prevented from defeating a recovery upon the ground of fraud. [8 Porter's Rep. 237, 351; 9 Id. 472; Dunklin v. Wilkins, et al. 5 Ala. Rep. 199; 13 Wend. Rep. 570; 21 Maine Reports 474.]

The evidence that the plaintiff was the agent of the defendant in buying the property, was such as should have been left to the jury. [4 Porter's Rep. 321; 2 Nott & McC. Rep. 563.] If the plaintiff did purchase as the defendant's agent, then the title revested in the latter, and the plaintiff could not recover on this action. [3 Bibb's Rep. 177; 15 Johns. Rep. 1; 1 Cow. Rep. 290; 4 Wend. Rep. 394; 12 Wend. Rep. 413; 9 Leigh. Rep. 387; 10 Id. 381; 20 Maine Rep. 317.] The defendant's assent to the plaintiff's agency may be inferred;—12 Johns. Rep. 300; 3 Cow. Rep. 281; 1 Hall's Rep. 247; 4 Porter's Rep. 321;—and this relation between the parties might be created without a legal consideration. [Story on Agency, 8–9; Paley on Agency, 249–250.]

W. P. Chilton, for the defendant. Certainty to a common intent is sufficient in a declaration in detinue, and the authorities very satisfactorily show, that the description of the property in question is quite certain enough. [8 Vin. Ab. 40; 2 Strange's Rep. 1014.] It is not necessary that the specific value of each article should be alledged. [8 Vin. Ab. 40; Bac. Ab. tit. Trover, F. F.; 2 H. Bla. Rep. 853; 2 Step. N. P. 1312.]

Conceding that the deed of trust was fraudulent as against

the defendant's creditors, he cannot be permitted to alledge the fact in evidence. [Clay's Dig. 255; 8 Porter's Rep. 351; 1 Ala. Rep. N. S. 237.]

But there was no evidence of fraud, or that the plaintiff acted as the defendant's agent in purchasing the property. If there was an agreement that the defendant should have the property upon paying plaintiff the purchase money, or that after he was reimbursed by a re-sale, the excess should be paid to the defendant, this would not affect the plaintiff's right to recover. The sale, for any thing appearing to the contrary, was fair—at least in accordance with the defendant's wishes, and the facts did not authorize him to ask the Court to instruct the jury, that the plaintiff acquired no title by the purchase. Such could not certainly have been the legal effect of the fraud supposed, unless the plaintiff had been paid the purchase money.

The title to the property in question did not vest in the defendant because the plaintiff bid it off; the arrangement between them, if any, was at most a trust, which is cognizable in a Court of equity, where ample justice could be done to the parties. If there was a fraud in the sale the defendant was a party to it, and cannot set it up. [Butler & Alford v. O'Brien, 5 Ala. Rep. 322; Foster v. Goree, Id. 424.]

COLLIER, C. J.—1. It is not necessary where the action of *detinue* is brought for the recovery of several articles, that the value of each should be stated separately in the declaration; but generally, the jury should sever the value of each by their verdict, that the plaintiff may recover them on their value, severally, in satisfaction; and the defectiveness of the finding in this respect, it is said cannot be supplied by a writ of inquiry. [1 Chitty's Plead. 123–4; 2 Steph. N. P. 1313; Pawly v. Holly, 2 W. Black. Rep. 853; 2 Stark. Ev. 494–5, notes 1 & 2.]

The declaration states the names of the slaves, the number of beds, bedsteads, &c., sought to be recovered, without a description of size, quality, &c., and this we think is quite sufficient upon demurrer. Detinue lies for writings whether in a box or not, and it is not necessary to state the date of a deed in a declaration. [2 Bacon's Ab. 317; 2 Steph. N. P.

1313.] So it may be maintained for money in a chest or bag; for particular pieces of gold or silver; for so many ounces of gold or silver; or for an infant negro naming the mother without any other description. [3 Com. Dig. 364; Bass v. Bass, 4 Hen. & Munf. Rep. 478; Holladay v. Littlepage, 2 Munf. Rep. 539.]

In Boggs v. Newton, 2 Bibb's Rep. 221, it was held, that a declaration in detinue for a horse, without designating the animal either by name, color, size, figure, &c. is bad; and that in trespass and trover where damages only are recovered, the same strictness in pleading is not required. [See 1 Chitty's Plead. 123; Buller's N. P. 49–50; 2 Saunder's Rep. 74, n. 2.]

Whether the case cited from 2d Bibb can be supported we need not inquire; perhaps it may, as "horse" is a generic term, and it is easy to specify the sex, &c. But we think it sufficient to declare for a negro woman by name, without stating her complexion, size, age, &c.; or for a cow without describing her color, mark, brand, &c.; or for so many knives and forks, without mentioning the maker's name, the character of the handles, metal, &c. In all these cases, it would be difficult by any circumlocution, so to particularize the property sued for, as to enable a person to identify and distinguish it by inspection. There are many negroes, as well as cows, knives and forks, &c., which would answer any reasonable or ordinary description that could be given on paper. This being the case, the declaration is sufficiently certain as applied to the subject matter, and to require more would, in many instances, be a denial of the remedy by action of detinue, where it is confessedly proper; for how can the loser or bailor of a great number of articles describe them with exactness and particularity? This result should be the more studiously avoided, as the statute has made the action of detinue a more efficacious, safe, and in some instances, more expeditious remedy than *trover*. [See Hildreth v. Becker & Harvey, 2 Johns. cases, 339; Coffin v. Coffin, 2 Mass. Rep. 363.]

2. It was clearly competent for the Court to allow either party to challenge a juror, at any time until the cause was submitted to the jury, although he may have been selected and sworn. A peremptory challenge should not be allowed

after the jury has been completed under the eye and with the assent of both parties; but in this case (if necessary) we might infer that a sufficient reason was shown for the exclusion of the juror. In Tatum v. Young, 1 Porter's Rep. 298, this Court said, "Where a cause has been tried by an unexceptionable jury, the law presumes no injury to either, for the want of any other person, in lieu of any of those composing that jury." The Court cited the United States v. Cornell, 2 Mason's Rep. 91, in which Mr. Justice Story said, "Even if a juror has been set aside by the Court for an insufficient cause, I do not know that it is a matter of error, if the trial has been by a jury duly sworn and impanneled, and above all exceptions. Neither the prisoner nor government in such case, can have suffered any injury." This reason is strikingly applicable to the case at bar, and we think affords a sufficient warrant for disregarding the exception to the decision of the Circuit Court upon the point we are considering.

3. The paper which was read to the jury in despite of the defendant's objection, was nothing more than a written request in the form of a letter, that the defendant would deliver to the plaintiff the property in question, or pay him the amount of the note which it had been sold to satisfy. It was certainly admissible in connection with other evidence, to show a demand and refusal, and it was thus limited by the Court. Under the first count this was perhaps necessary to be shown; but be this as it may, it was not impertinent evidence, prejudicial to the defendant, but at most merely unnecessary.

4. It is not pretended that the sale under the deed of trust is invalid, because the trustee did not pursue the directions of the deed in advertising and selling the property; and in the absence of the deed, or a recital of its contents, we cannot know that the trustee was not authorized to prescribe the day of sale and the length of time during which it should be advertised; or whether such power was not vested in any one of the creditors provided for. If a sale might be thus directed, the failure of the trustee to notify any of the creditors does not warrant the inference that as to the plaintiff, the sale was fraudulent.

The fact that the time of the sale was adjusted with a view to avoid a judgment to be rendered against the defendant does

not show the plaintiff contemplated a fraud upon the creditors of the former. His object may have been to collect a debt justly due without any interference with the property by an execution; and if his debt was incurred *bona fide* (as we must intend,) the fair inference is, that such was his purpose.

The supposition that the plaintiff in purchasing the property at the trust sale was acting as the agent of the defendant, is repelled by the evidence, which shows that it was agreed that the former should become the purchaser and allow the property to remain with the defendant to re-sell and pay the plaintiff, and if after this was done any thing should remain, the defendant was to appropriate it to himself. It may be, that the defendant acquired such a legal interest in the property immediately upon plaintiff's purchase, that the latter could not recover the possession by action at law; but this question is not raised upon the record. The charge prayed, was, that the plaintiff might be the defendant's agent without consideration therefor. This could not be a material inquiry upon the evidence; but the attention of the Court should have been called to the agreement between the parties, its validity, and whether it constituted a bar to the action.

The effort of the plaintiff to prevent another creditor from bidding for one of the negro women, if it had been successful might, perhaps, have thus far prejudiced his right to recover, on the ground, that it is against public policy to suppress competition at auction sales. But he cannot be in any manner affected by it, as it does not appear that his request was regarded by the bidder.

From this view of the evidence it will sufficiently appear, that it did not to any extent tend to fix a fraud upon the defendant, so as to prejudice his right of recovery. Consequently, neither the charge given, nor those refused in respect to the *mala fides* of the sale, authorize the reversal of the judgment of the Circuit Court. They must be regarded as abstract and not called for by the facts of the case. [See Rochelle v. Harrison, 8 Porter's Rep. 351; Eddins v. Wilson, 1 Ala. Rep. N. S. 237.]

5. The failure of the plaintiff to take the actual possession of the property in question at the time of his purchase, did not prevent the title from vesting. Actual possession by the

plaintiff is not necessary to maintain detinue. [Tunstall v. McClelland, 1 Bibb's Rep. 186.] It is enough if he show property in himself and possession by the defendant. [2 Starkie's Ev. 493, and cases cited in the notes.] The fact, that some of the property sold at a low price, in the absence of fraud imputable to the plaintiff cannot affect his right to recover.

The objection to the verdict that it does not ascertain the value of the several articles sued for, so as to enable the sheriff to know what sum the plaintiff is entitled to, upon the failure to deliver any one, is not in our opinion sustainable. In Viner's Abridgement, the law upon this point is thus laid down—the plaintiff declared of three gold rings, and certain parcels of cloth, &c., to the value of £30, in a gross sum, and the defendant pleaded to all *quod non detinet*, and the jury found that he detained all to the damage of £30, if the stuff could not be re-delivered. It was agreed that the plaintiff upon offer of the defendant of part of the stuff, is not bound to receive it, but may refuse it, if he does not offer all, and then he shall have all the damages, but if he has received any part of the stuff, he has foreclosed himself of all the damages; and therefore, because the declaration was of a sum in gross, and the defendant pleaded a plea to all, and the jury gave entire damages, it was held, that the plaintiff was entitled to judgment; but several of the judges thought otherwise.—(p. 40, tit. Detinue, § 13.)

So, it is said, the verdict and judgment must be such, that a specific remedy may be had for a recovery of the goods detained, or a satisfaction in value for each several parcel, in case they, or either of them, cannot be returned; and therefore where the action is for several chattels, the jury ought by their verdict to assess the value of each separately. But a flock of sheep is said to be an entire thing, and if the jury neglect to find the value, the omission cannot be supplied by a writ of inquiry. [2 Steph. N. P. 1314; Buller's N. P. 51.]

In Cheney's case, (10 Coke R. 119,) the Court say, *arguendo*, in *detinue* if the jury find damages and costs and no value, as they ought, it shall not be supplied by writ of inquiry of damages; because if the defect in the verdict could be thus supplied, the plaintiff would be prevented of his remedy by attaint, although the omission to assess damages was on purpose to

deprive the plaintiff of his attaint. But if the Court, *ex officio*, ought to inquire of any thing upon which no attaint lies, there the omission of it may be supplied by a writ of inquiry of damages.

It has been held, that where the plaintiff declared for several slaves, laying the value of each separately, and the jury find a joint value, the verdict will not support a judgment, but a writ of inquiry will be awarded that the damages may be severed. How far this decision was influenced by a local statute we are not informed. [Higginbotham v. Rucker, 2 Call's Rep. 313; Cornwell v. Truss, 2 Munf. Rep. 195.]

In Backner v. Haggin, 3 Monr. Rep. 59, the reason of the rule, why, in detinue for several articles, the value of each must be ascertained by a separate finding is said to be this, viz:—if after the operation of a *distringas* any one article cannot be had, the Court may on proper application, supersede the *distringas*, and direct a *fieri facias* or other writ for the value only. According to this rule, in an action for two horses, if one only "could be obtained and the other could not, there would be no means of ascertaining what credit should be given in value for the one obtained, and what sum should be reserved, for the one which was inaccessible; so that either the plaintiff below, must be obstructed in this event from proceeding further, or the defendant from obtaining any credit for the horse surrendered." [See Thomas and Wife v. Tanner, 6 Monr. Rep. 62, and also Thomas v. Blunt, 6 Litt. Rep. 104.]

It will appear from whatwe have said, as well as from the citations we have made, that although as a general rule, where detinue is brought for several distinct articles, *a verdict for the plaintiff should ascertain the value of each separately; yet the rule was not held universally;* as where the action is for a flock of sheep, &c.; and even where the jury assess the damages aggregately, it seems that instead of ordering a trial *de novo*, the appellate Court may remand with directions to award a writ of inquiry. Without stopping to inquire whether these several inferences are sustained by principle, we are satisfied that the objections to the verdict that it finds an aggregate sum as the value of a cow and calf, and that fourteen hogs are of the value of four dollars, without discriminating how much each is worth, are not fatal to the verdict. It is not to

be supposed that each of the hogs is of equal value, or that they are so dissimilar in appearance that they could be described on paper as to enable the sheriff or any one else to distinguish them. If then their value was separately assessed and a number less than all were offered to be returned, how could the sheriff tell for what sum to credit the judgment, or how to apply the values ascertained by the jury to each hog. All might be black, white or spotted, &c., and of the same sex, so that they could not be identified in reference to the verdict. It would then have been wholly useless to sever the value of the hogs, as from such a finding no consequences could have resulted; and as the law does not require that which is nugatory, we think the verdict is sufficiently specific. A herd or a number of hogs are quite as much an entire thing as "a flock of sheep." The same reasoning does not apply to horses or slaves, and as to these, the general rule we have stated, it may be conceded, is applicable. True, a cow and calf are distinct animals, but as the value of each is enhanced by being connected with each other, and as the plaintiff is not obliged to receive the cow without the calf, or *vice versa*, there was no necessity for determining their values *separately*.

JOHNSON v. LATTIMORE.

1. A Court may at the same term at which it renders a judgment, set it aside, and retrace its steps, and a writ of error will not lie to review its action in recalling its judgment.

Writ of error to the Circuit Court of Randolph County.

LATTIMORE had obtained a judgment in an attachment suit, in a justices's court of Randolph county, and having caused an execution to be levied on a tract of land, he then moved the Circuit Court at the Spring term, 1840, for an order of sale, under the statute directing such proceedings. The order was made, and a *venditioni exponas* issued the 22d August, 1842,

under which the land was sold to the plaintiff Lattimore. At the Spring term, 1844, a motion was entered by Johnson, that the constable should be permitted to correct his return upon the execution, under which the levy was made, so as to show that no notice of any kind was given to the defendant of the levy. This motion was granted and the amendment made. Afterwards in the same term, the order for the amendment was set aside, although resisted by Johnson, who excepted to the action of the Court in setting the amendment aside. This is the only matter assigned as error.

RICE, for the plaintiff in error, cited Watkins v. Gayle, 4 Ala. Rep. 153; Burns v. The State, 5 Ib. 228; Clay's Digest, 207, § 31.

WHITE, contra.

GOLDTHWAITE, J.—The writ of error in this case must be dismissed, because there is nothing for it to remove to this Court. The power of a Court to set aside its own judgments at the term at which they are rendered has never been disputed. It may be that here, the Court became satisfied that the evidence upon which it acted was unsatisfactory or not sufficient to allow the amendment; or it might have considered the amendment as immaterial, and for that reason unnecessary. Whatever may have been the reasons which induced the Court to retrace its action and recall its judgment, its effect was to leave the case as it originally stood, and consequently there is nothing to review. Writ of error dismissed.

McBEATH, ET AL. v. SPANN, USE, &c.

1. A writ was issued against three and executed on one, only; thereupon an *alias* writ was issued against all without noticing the partial service, and returned executed as to the other two, and not found as to the defendant previously served: *Held*—that the service of the original was not vacated by the *alias* and proceedings thereon.

Writ of error to the County Court of Macon.

THIS was an action of assumpsit on a promissory note, at the suit of the defendant in error against the plaintiffs. The original writ was returned executed on William Tatum, one of the defendants, and not found as to the other two. An *alias* writ issued against all the defendants and was executed in full, except upon Tatum, as to whom it was returned "not found." A judgment by default was rendered against all the defendants.

S. WILLIAMS, for the plaintiffs in error.

N. W. COCKE, for the defendants.

COLLIER, C. J.—It is insisted that by suing out an *alias* writ against Tatum, the service of the original as to him was waived, that having failed to appear, he was not before the Court so as to subject him to its judgment. There is no objection to the form of the *alias* writ; it would have been proper for the clerk to have indorsed on it how far the original had been executed, merely as a direction to the sheriff in the performance of his duties. But this was not an essential requirement. The return of "not found" as to a defendant, who had been already served with process, cannot relieve him from the legal effect of what had been done; or undo the regular service of the writ. All the parties had been duly notified of the pendency of the action, and having failed to appear, were liable to a judgment by default, consequently the judgment of the County Court is affirmed.

WILLIAMS v. CHARLES.

The settlement of an account by the defendant in execution with the sheriff, for money due from him, is no discharge of the execution, although the sheriff receipts for the amount of the account as money.

Writ of error to the Circuit Court of Macon.

This suit was commenced on a suggestion by Charles, that Williams, as the sheriff of Macon county, by the use of due diligence, could have made the money on a *fi. fa.* at the suit of Charles against one Jennings, and others.

At the trial of an issue between the parties it was in evidence that a *fieri facias* was issued on a forthcoming bond, on the 4th day of July, 1843, against Jennings and others, which the defendant returned satisfied as to all but 271 50-100 dollars, which amount he returned, had been paid to a former sheriff as appeared from his receipt. A *fi. fa.* had previously issued against Jennings and one of the parties on the 27th day of February in the same year, and was indorsed as received the 28th of that month, by one Fitzpatrick, who then was the sheriff. He vacated the office without doing execution by any actual levy, and the *fi. fa.* came to the hands of the defendant on the 18th May, of the same year. It was levied by the latter on a slave, and returned without satisfaction. Fitzpatrick was indebted to Jennings for fees as jailer, and on a settlement with him before he handed over the *fi. fa.*, last named to the defendant, as his successor he gave him a receipt for 271 50-100 dollars against the *fi. fa.*, but received no money from him. The defendant was notified when the execution last issued was placed in his hands, to proceed and make the money without reference to the receipt given by the former sheriff, as no money had been paid by Jennings.

On this state of proof, the defendant requested the Court to instruct the jury:

1. That if they believed that the execution placed in the hands of Fitzpatrick was never returned by him, but was afterwards placed in the hands of the defendant as his successor, and was by him returned levied, and returned as forfeited, that no rule could be maintained against the defendant on the execution subsequently issued on the forfeited bond.

2. That if Fitzpatrick received on settlement from Jennings an account due to him for jail fees, and gave a receipt for the amount when the execution was in his hands, then Jennings is discharged to that extent, and the defendant is not liable thus far.

3. That if they believed the receipt from Fitzpatrick to Jennings was presented to the defendant, he was bound to re-

ceive it as such; and that it was proper to be taken into consideration by them under the issue of due diligence, even though the defendant was notified that no money was paid by Jennings in satisfaction of the execution, if the former sheriff could have made the money out of Jennings by a levy.

These several charges were refused, and the refusal is now charged as error.

HARRIS, for the plaintiff in error.

COCKE, contra, cited Gullet v. Lewis, 3 Stew. 23; Bobo v. Johnson, 3 S. &. P. 385; Codwise v. Fields, 9 John. 263; Bank of Or. County v. Wakeman, 1 Cowen, 46; Mumford v. Armstrong, 4 Cowen, 553.

GOLDTHWAITE, J.—We are unable to perceive any error in the refusal to give the charges which the defendant below requested. The sheriff is a special agent appointed by the law to perform certain duties, and not the least important of these is, the collection of money on the final process of the Courts of justice. He is not permitted to negotiate between the parties so as to accept of any thing but money, as the satisfaction of an execution in his hands.

The settlement of an account with the sheriff in discharge of an execution in whole or in part, is no payment of money, and if permitted, would lead to the greatest abuses. In Bobo v. Johnson 3 S. & P. 385, this Court expressed a similar opinion where specific property had been traded for by a constable. In Codwise v. Field, 9 John. 263, where the sheriff, without consideration, discharged the debtor, it was said that such an act would not affect the creditor, although the sheriff would be bound. In a case determined at the last term, we held, that the sureties on a sheriff's bond would not be permitted to impeach his return of satisfaction, by showing that the defendant in execution had traded him a watch in payment; but it is evident the principle there was not the same as now presented.

Let the judgment be affirmed.

CRAWFORD v. THE BRANCH OF THE BANK OF THE STATE OF ALABAMA AT MOBILE.

1. A notice at the suit of a Bank against one of its debtors, was received by the sheriff on the 20th April, 1842, executed on the 7th May thereafter, and informed the defendant that the plaintiff would move for judgment against him "at the next term," &c., "to be holden," &c., in 1841. In May, 1842, the defendant appeared and filed a plea *in propria persona: Held*—that the fair inference was, that the motion was to be submitted at the term of the Court next succeeding the time, when the notice was issued and served, that so much of the notice as particularizes the time when the Court is to sit, may be rejected as surplusage; and that an appearance and plea to the merits is a waiver of the objection to the process, if it were otherwise available.

2. Where the debtor of a Bank, against whom the summary remedy (provided in such cases) has been prosecuted, pleads to the merits, and a verdict and judgment are rendered against him, he cannot object that the notice is defective, if it show *prima facie* that he is indebted to the plaintiff: *Semble*—where a motion is the initiatory process for the collection of a debt, it is not scanned with the same strictness as a declaration, or notice against an officer for default in the performance of his duty.

3. It is not enough to show that notice was sent through the post office addressed to the drawer of a bill at a particular place, but it should be proved that he resided there, or that that was the place at which notice should have been addressed to him.

4. The post mark on a letter is not evidence *per se* that the letter was deposited in the post office on the day indicated by the date of the post mark, yet its genuineness may be proved not only by the person who marks it, but by any person who is in the habit of receiving letters from that office. Upon such proof being made, it may be left to a jury to say whether the letter on which a post mark is, was not in the office where the mark purports to have been made, at the time of its date.

5. The notary public who protests a foreign bill is authorized to give notice of its dishonor to all persons who are responsible to the holders, and a notice describing himself officially to which his name is *printed* instead of *written* is good. In such case it may be intended from the similarity of the name that the person who made the protest, was the same who gave the notice; although there is no official seal attached to the notice.

6. Each party to a bill has, until the day after he has received notice of its dishonor, to give or forward notice to his prior indorser, and so on until the notice has reached the drawer.

7. The notary protesting a bill may send notices to the holder to be given to the prior parties, but the person to whom the notices are sent must appear to be the

holder, or perhaps it may be sufficient to show that he is his agent: in transmitting the notice made out by the notary, the holder is not bound to use a greater degree of diligence, than if he had prepared and forwarded notices in his own name.

8. Where a notice of the dishonor of a bill identified it with *reasonable* certainty, and there being no evidence to show that the party to whom it was given, could have been misled, the Court might have informed the jury, that, if they found the other facts in respect to the notice in favor of the plaintiff, the notice itself in the absence of countervailing proof sufficiently identified the bill.

9. It cannot be judicially known, that a person who was elected by the Legislature as one of the directors of a Bank, was appointed by the board its president *pro tem.*, merely because he certifies that a debt sought to be recovered by notice, is *bona fide* the property of the Bank.

Writ of error to the Circuit Court of Mobile.

This was a proceeding by notice and motion under the charter of the Bank, to recover a judgment against the plaintiff in error, as the drawer of a bill of exchange, drawn by him at Mobile, the 15th April, 1841, on Wm. C. Dickinson of Mobile, requesting him to pay to Henry G. Davis, or order, nineteen hundred and fifty-two 92-100 dollars, on the 20th December next thereafter, payable at the Merchants' Bank of the City of New York. The cause was tried on the plea of *non assumpsit.* On the trial the defendant below excepted to the ruling of the Court. The bill of exceptions shows that the notice, with the returns thereon, as well as the certificate of the president of the Bank was produced, without proof to sustain the same; whereupon the defendant objected to the motion, without proof of the notice and its return, also the official character of the persons whose names were on the notice and certificate; but the Court overruled the objection, and entertained the motion.

The plaintiff then adduced the bill and its protest for non-payment, as also a notice signed by the notary in New York, informing the defendant of the dishonor of the bill. A witness testified that the notice was received by the plaintiff in a letter written by the cashier of the Merchants' Bank of New York, whose name is on the bill; and on behalf of that Bank the bill was protested on the 23d of December, 1841. When the notice was received by the plaintiff at Mobile, its cashier on the same day, (viz: the 6th January, 1842,) transmitted it through the post office at Mobile, to the defendant at St. Stephens. It

was admitted that the direct route from New York to St. Stephens was by way of Claiborne and Jackson; that letters were usually transmitted by these places, and would be delayed in reaching their point of destination if they were carried to Mobile first.

The notice received by the plaintiff was postmarked New York, the 24th December, 1841. The defendant objected that the proof was not sufficient to sustain the motion; that the notice on the face of it was insufficient, because it did not appear that the bill was discounted, and the person whose name was printed as a subscriber to the notice, and described as a notary, was not shown to have adopted it as his act; nor did he appear to be a party to the bill. *Further*—it was objected that it did not appear otherwise than by a post mark, that the notice was forwarded from New York in due season, "and that the notice to defendant was not sufficient." Upon all the facts it was insisted that judgment should be rendered for the defendant. But the Court overruled all the defendant's objections, and adjudged the proof to be sufficient: whereupon the defendant agreed that a judgment might be rendered against him as on verdict, and the several legal questions arising upon his bill of exceptions were duly reserved.

Crawford, Pro. Se., submitted an argument in writing, and J. A. Campbell, argued the cause at the bar for the plaintiff in error. The following points were made:

1. The notice required the defendant below to appear two years before the motion was submitted, and nearly twelve months before the maturity of the bill, and show cause why a judgment should not be rendered thereon against him. [Crawford v. The Planters' and Merchants' Bank, 4 Ala. Rep. 313.]

2. The notice is insufficient because it does not alledge a demand of the payment of the bill at maturity, and a notice of non-payment to the defendant as drawer. [6 Cranch's Rep. 221; 1 Stewt. & P. Rep. 488.]

3. The Circuit Court instead of referring the facts to the jury, took upon itself to adjudicate both the law and the facts—a course of procedure wholly unwarranted where an issue has been submitted to the jury for its decision. [4 Cranch's Rep. 71.]

4. It does not appear that the defendant resided at St. Stephens at the time the notice was sent there, or that there was a post office at that place. The bill of exceptions professes to state all the evidence, and it cannot be intended that there was other proof on this point than the record discovers. [Stephens v. Broadnax & Newton, 5 Ala. Rep. 258.]

5. The post mark upon the letter forwarded from New York, is no evidence that the notice was sent on that day. The law does not require such a mark to be made, but it is made the duty of the deputy post masters, by the 73d rule for the regulation of their conduct, thus to make up the mails.

6. The notice of non-payment has the printed name of John D. Campbell, described as a notary public at its foot, yet it is insisted that he was not authorized to give notice. Notice should be given by "the holder of a bill, or some other party entitled to call for payment, or reimbursement." The notary who protests a bill is the agent of the holder, but there is no evidence that Campbell was a notary; this could only be shown by his official seal, or other legal evidence of the fact. The holder of the bill might have adopted this imperfect notice as his own act by inclosing it in a letter, but this was not done; the notice was merely folded in letter form, addressed to the drawer at St. Stephens, without a word being written by the plaintiff's officer or any one else. [2 Hawks. Rep. 560.]

7. There was no proof that the Merchants' Bank of New York acted as the agent of the plaintiff, or that the latter was the holder of the bill. It is admitted that it is competent for a notary who protests paper to return it to his principal, and the latter may give the necessary notices to charge the previous parties; but this does not appear to have been done. It is insisted, that as notice was not given in a manner *prima facie* regular, the proof should show that the defendant was informed of the dishonor of the bill quite as early as he would have been had the notice been transmitted from New York to St. Stephens direct. [Bayley on Bills, 225; Chitty on Bills, 229; 6 Shepley's Rep. 292; 8 Porter's Rep. 262.]

8. The Court should have referred it to the jury, to inquire whether the notice of non-payment sufficiently identified the bill. [Bailey on Bills, 253; 3 Wend. Rep. 456.]

9. The signature of the president *pro tem.*, of the Bank, to the notice of the motion, or to the certificate, that the bill was the property of the plaintiff, was not shown to be genuine; or that the character of the individual subscribing them was what the notice and certificate imports.

DARGAN, for the defendant.

COLLIER, C. J.—The notice informs the defendant, that the Branch of the Bank, &c., will move for judgment against him, "at the next term of the Circuit Court to be holden for said county of Mobile, on the sixth Monday after the fourth Monday in March, 1841, and on the seventh Monday of said term." This notice was received by the sheriff of Mobile on the 20th of April, 1842, and executed on the 7th of the succeeding month. In the transcript there is a plea entitled, Fall Term, 1842, which was interposed by the defendant below *in propria persona;* at the foot of which the following memorandum is attested by the clerk, viz: "Filed, 5th May, 1842." The fair inference from all this, is, that the motion was to be submitted at the term of the Court next succeeding the time when the notice was issued and served. We have repeatedly held, that where a writ requires the defendant to appear *at the next term of the Court,* and particularizes a time past, too remote in the future, or a time at which the Court does not sit, that this description of the term will be rejected as surplusage, and the process be held returnable at the term prescribed by law. We will not say that a notice, when it is the initiatory process, shall be governed by the same rule; but we cannot think that there is any principle that will permit a party to come into Court, plead to the merits of the action, and then say that the process is defective, because it is returnable at a time previous to its service.

In Barton, et al. v. Peck, 1 Stew. & P. Rep. 486, it was determined that in a summary proceeding against a sheriff and his sureties under the statute, for the failure to pay over money collected on an execution, the notice must alledge that a demand was made of the sheriff, by whom, when and where; otherwise it will be bad on demurrer. This case was recognized in Broughton, et al. v. The Bank of Alabama, 6 Porter's Rep. 48, and under the influence of its authority it was held

to be competent to object to the notice in such case, on demurrer, or after *judgment by default* on error. But the objection never could be allowed after plea and verdict. It may be remarked, that the cases cited have never been applied to notices at the suit of a Bank against a debtor. In Lyon v. The State Bank, 1 Stew. Rep. 442, it was decided that such notice is sufficient, if it identify the debt with reasonable certainty, though it has not the technical precision of a declaration. This decision has been followed in practice, and the Bank notices have been considered unexceptionable, although they do not contain the extrinsic allegations that are essential to a declaration.

It is true, it does not appear to have been shown that the defendant resided at St. Stephens, or that, that was the place at which notice should have been addressed to him. This was necessary to have been proved in order to make the notice available. We cannot think that this objection was specifically made in the Circuit Court, or it doubtless would have been sustained; yet upon the general objection of the insufficiency of notice to the defendant, we think it must be considered as properly presented. General objections calculated to entrap the Court, and the adverse party should be discouraged, and where they are not promotive of justice, should be most unfavorably regarded in an appellate Court; but the objection in the present instance, is not so loosely expressed as to authorize us to overlook it.

It is not only necessary that the drawer of a bill should be notified of its dishonor by depositing a notice in the post office, when such is the proper medium of conveyance, but it should be properly addressed to him. Now there is nothing in the record to show that the defendant resided at St. Stephens, or that notice should not have been given him at New York or Mobile. In the absence of proof on this point it cannot be assumed that his residence was at one place or another, or that the notice was properly transmitted. The Court then should have required the plaintiff to make further proof on this point.

In respect to the post mark upon the letter supposed to have been mailed at New York, it is not evidence *per se* that the letter was deposited in the post office on the day indicated by

its date. Chitty in his Treatise on Bills, (645–6,) thus states the law on this subject: "In civil cases, the post mark upon a letter seems to be evidence of the time and place when it was put into the post office; and sometimes a reference to the *post mark* on a letter misdated will establish the real time of sending notice of the dishonor. In such case, although the post mark is not necessarily assumed to be genuine, and the best evidence of its authenticity would be the testimony of the very person who impressed the mark, yet it should seem that it may be proved by any post master, or any person in the habit of receiving letters by that post." It has been frequently held that post marks proved to be such, are evidence that the letters on which they are, were in the office where those marks purport to have been made, at the time of their date. [Kent v. Lowen, 1 Camp. Rep. 177; Rex v. Watson, Id. 215; Langdon v. Hulls, 5 Esp. Rep. 156; Rex v. Johnson, 7 East. Rep. 65; Fletcher v. Braddyll, 3 Starkie's Rep. 64; Rex v. Plummer, R. & M. C. C. 264; Abbey v. Lill, 5 Bing. Rep. 299.] In the present case there was no evidence of the genuineness of the post mark, and that fact could not be assumed in despite of the objection of the defendant, to the insufficiency of the proof to show, that he had been duly notified of the dishonor of his bill. The post mark being proved by competent evidence, the date which makes a part of it, would show *prima facie* at what time the mail was made up in which the notice was sent.

Upon the dishonor of a foreign bill the custom of merchants makes a protest indispensably necessary, and the production of this protest attested by a notary public, without proof of the signature, or affixing of the seal, will in the case of a bill payable and protested out of this country, be evidence of the dishonor of the bill, and to it all foreign Courts give credit. [Chitty on Bills, 9th Am. ed. 361–2.] But the mere protest is not sufficient, a copy of it, or some other memorial must be sent within a reasonable time to the person on whom the holder means to call for payment. [Id. 363; Wallace v. Agry, 4 Mason's Rep. 336; Lenox v. Leverett, 10 Mass. Rep. 1.]

The law does not prescribe any form of notice to an indorser; all that is necessary is, that it should be sufficient to put the party on inquiry, and to prepare him to pay it or to defend

himself. Even if there be some uncertainty in the description of the bill or note, if it does not tend to mislead the party it will be good. [Reedy v. Seixas, 2 Johns. cases, 337; Mills v. Bank of the United States, 11 Wheat. Rep. 431; Forster v. Jurdson, 16 East. Rep. 105; Chitty on Bills, 9th Am. ed. 501, et post & notes.] Where a note was payable in Bank, and a notice of non-payment was given on the day that it became due, but in the notice the name of the maker was mistaken and the note was stated to be due three days before; the notice was held sufficient, it being in evidence that the indorser was liable on no other note in Bank. [Smith v. Whiting, 12 Mass. Rep. 6; 3 Kent's Com. 2d. ed. 94.] A notice in these words, "I give you notice that the bill drawn by you, &c., is dishonored," was adjudged sufficient. [Beachamp v. Cash, D. & R. Rep. (N. P.) 3.] So it has been held, that it need not state at whose request it was given, or who was the owner of the note. [Shed v. Bret, 1 Pick. Rep. 401.] Nor is it necessary that it should state that the holder looks to the party notified, for payment; this is the natural implication from the notice itself. [Bank of the United States v. Carneal, 2 Porter's Rep. 543; Cowles v. Hart, 3 Conn. Rep. 516.]

It is said not to be necessary that the notice should come from the party who holds the bill, when dishonored, that it suffices if given by any person who is a party to it. And it has therefore been held, that if the drawer or indorser of a bill of exchange receives due notice of its dishonor, from any person who is a party to it, he is directly liable upon it to a subsequent indorser, from whom he had no notice of the dishonor, even from the acceptor. [Chitty on Bills, 9th Am. ed. 527-8, 530.]

The notice in the present case is addressed to the defendant by writing his name at the foot of the page, as will be seen below. It is dated New York, December 23, 1841, and proceeds thus: "Please to take notice that your two bills on Wm. C. Dickinson, one for 1,000 dollars and the other for 1,952 92-100 dollars, and accepted by him, are protested for non-payment, and that the holder looks to you for the payment thereof. Your obedient servant, JOHN D. CAMPBELL,

Notary Public, Merchants' Bank, and Attorney at Law—office No. 20, Wall street.

MR. WM. CRAWFORD."

This notice when taken in reference to the bill which was payable to the Merchants' Bank, at which Campbell seems, by his subscription to exercise the office of notary, and the protest which was doubtless adduced at the trial, though it does not form a part of this transcript, would authorize the presumption, that the party in whose name the notice is made out, was a notary public, and the same who protested the bills. This remark is made upon the presumption that the same name appears to the protest and notice.

The fact, that the name of "John D. Campbell" and his official designation, residence, &c. are printed, are wholly immaterial. If he adopted this as his own, it would be quite as effective for all legal purposes, as if written with his own hand. If then, there exists the harmony supposed, between the notice and the protest, the inference must be, that the person whose name appears to the notice, is the notary who was authorized to demand payment of the bills, and of consequence the agent of the holder to give notice of their dishonor.

If the notice had been signed by a stranger representing himself as the agent of the holder of the bills, it would doubtless have been sufficient, if in truth he was his agent, although the defendant may not have been informed that such was his character. Here it was subscribed by a notary, who if he protested the bills was authorized to give notice of their dishonor. The protest by him would be evidence of his authority, and make the notice sufficient without the aid of a notarial seal, or other assistant proof.

It is usual for the holder only to give notice to the person from whom he immediately received the bill or note; especially if he is ignorant of the residence of the other parties. The rule is settled, says Chitty—(Treat. on Bills, 520–1)—"that each party to a bill or note, whether by indorsement or mere delivery, has in all cases until the day after he has received notice, to give or forward notice to his prior indorser, and so on till the notice has reached the drawer. And this rule is so strongly fixed, that a party receiving notice of the dishonor of a bill, need not give or forward notice to the party immediately before him, till the next post after the day on which he himself received notice, although he might easily have forwarded it on that day, and although there is no post on the day follow-

ing." It is conceded that the law is as here stated, but it is denied that the notary in New York was authorized to send notices to the plaintiff to be addressed to the defendant or other parties, or that the notary could give notice to the defendant by letter, otherwise than by the direct course of mail.

The record does not show that the plaintiff had any interest in the bill either as principal or agent at the time of its dishonor, and it cannot be said that the notices were properly sent to it, or that it was authorized to give notice to any party to the bills. Perhaps the protest may impart the necessary information on this point. But if the plaintiff was a party subsequent to the defendant, it cannot be questioned that it was competent for the notary protesting the bills to send notices to the Branch Bank. Whitman & Hubbard v. The Farmers' Bank of Chattahoochie, 8 Porter's Rep. 258, impliedly admits that such is the law. Carson v. The Bank of Alabama, 4 Ala. Rep. 148, proceeds upon the same hypothesis; for a notice thus sent in that case, had been deposited in the post office, and no objection was made to its sufficiency. [See also Foster v. McDonald, 5 Ala. Rep. 376.]

In Freeman's Bank v. Perkins, 18 Maine Rep. 292, the Court say, where the cashier of a Bank is resorted to, by the proprietor of a bill to obtain payment, "he is to be considered as it respects the time of causing a protest to be made, and of giving notice, as a distinct holder or party to the instrument." It is however intimated that if either the collecting agent or notary know where the party to be charged resides, notice should be sent directly to him; but if they are ignorant of his residence, the notice may with propriety be directed to the holder of the paper. The Court further held, that it was competent for the holder to send a notice of his own by the mail of the succeeding day; but where he sent the notice prepared and transmitted to him by the notary, the indorser was adjudged to be discharged, because such notice was not forwarded by a mail that left two hours after its receipt. This decision is exceedingly unsatisfactory. With the first point determined by it, we have now nothing to do; the second, we have seen, is not in harmony with our own adjudications. The third, is sustained by no authority, which has ever come under our notice. In

distinguishing between a notice prepared by the notary himself and one made out by the holder of paper, the Court have acted upon reasoning too refined to be made the basis of a legal principle; and we cannot therefore recognize it as authoritative.

Under the circumstances of this case, there was no necessity for referring to the jury the sufficiency of the notice to identify the bill. It identified with reasonable certainty both the bills by stating the name of the drawee and their amounts; and there was no evidence showing that the defendant had drawn any other bills for the same or a different amount on Dickinson. The genuineness of the notice conceded, the identification of the bill was a necessary conclusion. The case of the Ontario Bank v. Petrie, 3 Wend. Rep. 456, is unlike the present. There the note was due on Sunday, the 31st of August, the demand was made on Saturday, the 30th, and notice sent by the first mail. The notice dated the *thirtieth* states payment was demanded *last* evening instead of this evening; and the Court said that the Circuit Judge "was right in submitting to the jury the question whether the defendant was misled." In that case it could not be assumed from the notice, that the defendant was not misled, and hence the propriety of directing the inquiry of the jury to the point. But here under the proof there was no ambiguity, and the Court might very well have informed the jury, that if they found the other facts in respect to the notice in favor of the plaintiffs, the notice itself in the absence of countervailing proof, sufficiently identified the bill. This view does not at all trench upon the powers of the jury. It is but the common practice of instructing a jury what are the legal conclusions from established facts. In cases where there is room for doubt as to what construction should be placed upon a written notice, and what the party to whom it was addressed should understand by it, the question should be referred to the jury.

By the third section of the act creating the Branch of the State Bank at Mobile, it is provided, that the president of that institution shall always be one of the board for the transaction of business, "except in cases of sickness or necessary absence, in which event the board may appoint a president *pro tempore*." In Bancroft v. The Branch Bank at Mobile, 1 Ala.

Rep. N. S. 230, we held, that the certificate of the president *pro tem.*, was competent to show that a note sought to be recovered by notice and motion under the charter, was *bona fide* the property of the Bank. In Roberts, et al. v. The State Bank, 9 Porter's Rep. 312, it was decided that it was not necessary, that the certificate of the president elected by the Legislature should be authenticated by the seal of the corporation; that the Court would judicially recognize his official character, and intend in the absence of all proof on the point that his signature was genuine. This decision was made upon the ground that the President was *quasi* a public officer, and the evidence of his election and qualification was shown by the archives of the State. But in Crawford v. The P. & M. Bank of Mobile, at the last term, we considered, that as the State had no interest in that institution, and no agency in electing its officers, it could not be judicially known that certain persons who had acted as president and commissioner, were in point of fact such officers; and that their official character should be shown by proof.

Neither of the cases cited is like the present in its facts. In Bancroft's case, the official character of the president *pro tem.* was impliedly, if not expressly conceded. In Robert's case, the president derived his office from the Legislature; and in the last, the Legislature had no interest in the corporation or anything to do with the election of its officers. Here we are required to know that an individual of the same name who makes the certificate was elected a director, but we are not informed that he was president *pro tem.* when he made the certificate. There can be no evidence of the fact in any of the public offices. Under these circumstances it cannot be intended, that he was authorized to exercise the character assumed. His act does not prove that he had the sanction of the board to sustain him, and as this was indispensable to its regularity, it should have been established by proof. The most liberal presumption in favor of what has been done by persons in public stations would not allow such proof to be dispensed with.

This closes the view, which the argument for the plaintiff in error required us to take of this cause—the result is, that the judgment of the Circuit Court is reversed and the cause remanded.

We observe that the clerk of the Circuit Court has improperly sent up some of the original papers with the transcript, which will be indispensable upon another trial below: the clerk of this Court will therefore deliver them to the clerk of the Circuit Court, the attorney of the Bank, or the order of either of them, upon exact copies being substituted and attached to the transcript.

T. & J. KIRKMAN, ET AL. v. VANLIER.

1. Where matters of account between the complainant and defendant are complicated, embracing the transactions of several years, relating to the employment of several steamboats upon their joint account, and made up of many charges, for and against each other, a Court of equity may entertain the complainant's bill for a settlement of accounts, and the recovery of a balance.
2. *Quere?*—When a demand is primarily enforceable in equity, is it not competent for the complainantin such case to ask a decree against his debtor, and in the same bill to seek to subject debts due to the latter to its payment.
3. The remedy by attachment for the recovery of a legal demand being given by statute to one non-resident against another, Courts of equity by analogy must afford the same facility of collection to a creditor whose claim is of an equitable nature.
4. Where an order of reference to the register is general, viz: of "the matters of account between the parties," without giving any direction as to the mode of taking testimony, whether any should be taken, or whether the same should be specially reported, it is competent for either party to lay before the register the books showing the state of accounts which it is the object of the suit to adjust, and also to examine witnesses *viva voce* in aid or explanatory thereof.
5. *Semble*—Under a general reference to a register to ascertain a fact, he should report his conclusion and need not embody the evidence upon which it is founded.
6. The rule of practice declaring that exceptions to testimony taken by the register must be taken before him, and certified in his report, and if not so taken the exception is waived; consequently, to authorize the Chancellor to sustain an exception, it must appear from the report to have been regularly taken, or at least to be well founded.

7. Where a bill is filed for the purpose of subjecting a sum of money in the hands of a third person, to the payment of a debt due the complainant, if such person is enjoined from using it, does not offer to bring it into Court, &c., but insists upon his right to retain it both as against the complainant and his debtors he will be charged with interest.
8. A bill filed by a defendant to a suit in equity, against the complainant, recited the pendency of the original cause, yet did not pray that it might be regarded as a cross bill, or that the suits might be brought to a hearing at the same time; was filed after an order of reference and report of the register in obedience thereto, but did not ask an injunction, or other order to stay proceedings in the original cause, and no such order was made; nor did the complainant's therein propose to submit to a hearing on bill and answer: *Held*—that the Chancellor might with strict legal propriety, refuse to consider such a bill as a cross suit; and if it was an original independent bill, a decree dismissing it could not be revised on a writ of error sued out in the original cause.
9. Where a fact is alledged in a bill, which *prima facie* must be within the knowledge of the defendants, if he omit to notice it in his answer, he shall be held to have admitted it, at least so far as to dispense with proof from the complainant to establish its truth.

Writ of error to the Court of Chancery sitting in Lauderdale County.

In July, 1834, the defendant in error filed his bill in the Circuit Court of Lauderdale, against Hugh Findren, Thomas and James Kirkman, and John Stacker, alledging that the former was indebted to the complainant in the sum of three thousand, four hundred and fifty-nine dollars and ninety-six cents. That, that indebtedness occurred in consequence of advances made by Messrs. E. Webb & Co. for the account and benefit of Findren, and for his proportion of losses sustained in the purchase and sale of steamboats; in the running of which they were interested as part owners and joint proprietors. The balance of the account is the result of *debits* and *credits*, but has never been adjusted by settlement between the parties. It is further alledged that the complainant was a member of the firm of E. Webb & Co.; that, that concern has been dissolved, and in consideration of an assumption of its liabilities by him, the debt due by Findren, as well as other demands, have been assigned to the complainant, with authority to use the firm name in their collection.

The bill further states, that Findren and E. Webb & Co. caused to be built the steamboat "Mohawk;" the former being proprietor of four twenty-fourths, and the latter of the

residue of the shares of the boat. Afterwards Messrs. E. Webb & Co. disposed of their shares, as follows, viz: nine twenty-fourths, to Messrs. T. & J. Kirkman, and the eleven remaining shares to John Stacker; which several purchasers, together with Findren, run the "Mohawk" for freight during the business season of 1833–4. That Messrs. T. & J. Kirkman were the agents of the boat; that its earnings were large, and the share of Findren is still in their possession.

It is also alledged, that Findren is a non-resident and insolvent, and that the only means known to the complainant of obtaining satisfaction of his demand is to subject the money due Findren in the hands of T. & J. Kirkman, to its payment. The complainant prays, that inasmuch as his accounts with Findren are of a nature too complicated to be the proper subject of adjustment in a Court of law, an account may be taken in equity and a decree rendered in his favor for so much as may be found due: that in the meantime Messrs. T. & J. Kirkman be enjoined from settling with Findren, or paying him any thing due upon the account of the "Mohawk;" and that such decree as the complainant may obtain against Findren may be satisfied *pro tanto* from his funds in the hands of the Messrs. Kirkman.

Findren admits in his answer, that he is indebted to the complainant, the amount charged with interest; but he cannot state what amount of his funds are in the hands of the Messrs. Kirkman—he refers to the books kept on the boat to show his proportion of the profits; in addition to which, he insists that he was entitled to twelve hundred dollars, for his services as master of the "Mohawk," for the business season of 1833-4.

Messrs. T. & J. Kirkman admit that they with Findren and Stacker were joint owners of the steamer "Mohawk," as alledged in the bill, and that they were agents of the boat at Florence during the business season of 1833 and '4; as such they made heavy advances for repairs and other expenses, so that they do not admit they have in their hands any funds belonging to Findren, beyond the division of profits they are entitled to retain in virtue of their shares. They aver that there is a large amount of accounts still due the boat, and heavy demands made of the proprietors thereof for losses sustained by persons who shipped merchandise on her; for the recovery

of damages thus sustained, suits have been brought, and are now pending in the Federal Court of West Tennessee, and at New Orleans. The nominal amount due the defendant Findren as shown by an account current is twenty-five hundred and sixty-three 76-100 dollars, subject to deductions which reduce it to the sum of one thousand and seventy-eight 13-100 dollars. In addition to this, these respondents insist that they are entitled to compensation for trouble and expense in collecting the debts due the "Mohawk."

Stacker failed to answer the bill, but as to him publication was duly made, as against a non-resident, and the bill taken for confessed.

Upon the establishment of separate Chancery Courts, this cause was transferred to that tribunal, and an order was there made referring it to the register to examine and state the matters of account between the parties. In obedience to this order the register reported that there was due to the complainant from Findren for principal, the sum of thirty-four hundred and fifty-six 76-100 dollars, with interest thereon, amounting to the sum of nineteen hundred and sixty-two 73-100 dollars. He also reported that Findren's share of the profits, after deducting the amount of his account with the boat, and his proportion of the expenses of defending law suits in New Orleans and Tennessee, was eighteen hundred and fifty-five 04-100 dollars; on this sum there was due for interest nine hundred and seventy-four 04-100 dollars, calculated from the 7th December, 1835, the day on which the books were balanced.

Messrs. T. & J. Kirkman excepted to the report, and assigned the following reasons, viz: 1. Interest was computed in the account against them, although they were restrained by an injunction from paying over the amount in their hands. The 2d, 3d, 4th, 5th and 6th reasons insist that they were charged with moneys not collected—are not credited with moneys paid out—and are not allowed compensation for collecting and disbursing cash, &c. The amounts are particularly mentioned in the exceptions.

These several exceptions were overruled by the Chancellor, and the reports of the register confirmed. A decree was thereupon rendered in favor of the complainant against Findren for

the amount of the sum due by the latter, and it was adjudged that Messrs. T. & J. Kirkman pay to the complainant the amount they are indebted to Findren: that the costs be paid from the moneys in their hands, and Findren be charged therewith.

After the account was taken, and the result reported by the register, a bill was filed by Messrs. T. & J. Kirkman against the complainant, Findren and Stacker, reciting the substance of the complainant's bill, proceedings had therein, and alledging that the latter was the proprietor of the shares of the "Mohawk," which in his bill he affirmed belonged to Stacker: *Further*—they alledge that the complainant has received upon the shares standing in the name of Stacker a larger amount than he was entitled to, and that he (Stacker) is indebted to them; the amounts of which several sums are particularly stated. The Messrs. Kirkman further state, the complainant is insolvent and a non-resident; and that Stacker resides in the State of Missouri: they therefore pray that the complainant be restrained from collecting the demand asserted by his bill until they are credited with the set-off claimed by them: that they are remediless at law; because their accounts are complex, &c. Hence they ask that an account be taken, and for further relief. No injunction seems to have been awarded upon this bill—it was treated as a cross bill, and dismissed at the hearing of the principal cause, with costs.

E. W. Peck and L. Clark, for the plaintiffs in error, made the following points: 1. That Vanlier was a general creditor of Findren, and could not subject through the medium of a Court of equity a debt due to him, or money in the hands of a third person, until after his legal remedy by judgment and execution had proved unavailing. [Story's Eq. Plead. § 10; 2 Johns. Ch. Rep. 144; Id. 283; 4 Id. 671, 687, 682; 1 Monr. Rep. 106; 2 Blackf. Rep. 421; 3 Yerger's Rep. 81; 6 Rand. Rep. 188.] The non-residence of Findren cannot give jurisdiction to the Court of Chancery; besides it does not appear but that the complainant resides in the same State with him. [2 Porter's Rep. 374.] The insolvency is equally unavailing; and even if a ground of jurisdiction, is not proved.

2. The bill should have been dismissed for a misjoinder of

distinct complaints against different defendants. The Messrs. Kirkman had nothing to do with the litigation between the complainant and Findren. No fraud is alledged, nor is a discovery sought to enable the complainant to establish his demand. Jurisdiction is not defensible upon the ground that the bill sought to enforce an account. If a discovery had been necessary and actually made, then relief could have been granted. [1 Story's Eq. § 45–6, 71, 74, 458–9.]

3. The Chancellor erred in overruling the exceptions to the master's report, which was erroneous. 1. Because it charged the Messrs. Kirkman with interest, when they had been enjoined from settling with, or paying over the money to Findren. 2. Because the account was taken as if the parties had been part owners merely, whereas the account depended upon the joint employment of the boat, and as to the profits they should have been treated as partners. [4 Johns. Ch. Rep. 522.]

4. The cross bill should not have been dismissed. There was no regular publication of the testimony before that bill was filed—(8th rule Chan. Practice)—but if publication had been duly made, it was not necessary for the complainants in that bill to have proposed that it should have been heard on bill and answer. [Story's Eq. Plead. 314, § 395–6.]

A. F. Hopkins, for the defendant, insisted—1. That the bill filed by the Messrs. Kirkman could not be treated as a cross bill; because it does not pray that it may be heard at the same time as the original bill; and no process had been issued or dispensed with by the appearance of the defendants to it. [1 Edwds. Rep. 226; 5 Monr. Rep. 420; Mitf. Plead. 122, note.] The cross bill cannot be allowed as such, because it contradicts the answer of complainant therein, who admits that Stacker had become the proprietor of eleven twenty-fourths of the "Mohawk." [Mitf. Plead. note 1.] *Besides*—it proposes to put in issue matters not controverted by the answer.

2. The settlement of the account between the complainant and Findren was within the jurisdiction of equity—it grew out of their joint ownership of three steamboats. [Story's Partn. 632; 1 Story's Eq. 441–7.] This being the case as to Findren, a Court of Chancery would assist the complainant to recover his demand by restraining the Kirkmans from paying

over to F. what was due him, and compelling them to account to the complainant. As to the latter, the fund in their hands was equitable, and might be reached through the medium of equity. If required to exhaust all his remedies against Findren before proceeding against the Kirkmans, the complainant would be delayed, and probably fail in subjecting the funds in their hands.

3. As to the decree against the Messrs. Kirkman for interest, it is clearly correct. They were not obliged to keep the money in hand, but might have brought it into Court and discharged themselves: instead of doing this, they denied an indebtedness; and like an ordinary debtor they should be charged with interest. [Fonb. Eq. 476; 1 McC. Rep. 213, 220; 1 Binn. Rep. 199; 4 Sergt. & R. Rep. 116; 4 H. & Munf. Rep. 416; 2 Johns. Ch. Rep. 108; 6 Id. 358.]

4. The insolvency of Findren, if essential to the jurisdiction of equity, must be considered as admitted, as it is not denied by the answers. [3 Bibb's Rep. 466, 539; 1 Porter's Rep. 375; 3 Id. 125.]

5. It was contended further, as to the bill of the Messrs. Kirkman, that being filed after publication and the master's report, it should have proposed to submit to a hearing on bill and answer alone: that the case made out by it, was not one of mutual credit: that no process was issued, or time asked, for that purpose. [Mitf. Plead. 125, note 1, 2; Paige's Rep. 164; 2 Ves. Senr. Rep. 336.]

Without an order to that effect, Vanlier was not bound to stay proceedings that the cross bill might be heard with the original. [Mitf. Plead. 125, note 1, 2; Mad. Rep. 392; 2 Paige's Rep. 166.] The omission of the Messrs. Kirkman to put their bill in a condition to be heard with the original authorized its dismissal;—but can it be treated as a cross bill, and the decree so far as it operates upon it be revised?

If the bill of the Kirkmans could be treated as an original, entitled to a separate hearing when prepared, the decree of dismissal cannot be revised upon the writ of error before the Court, which brings up only the suit of Vanlier.

COLLIER, C. J.—The points made by the Messrs. Kirkman, who alone complain of the decree of the Chancellor, lead us first to consider, whether the bill discloses such a case, as authorizes the relief which the complainant seeks. It is expressly charged that the matters of account between the complainant and Findren grew out of advances made by a firm of which the former was a partner, and for the proportion of losses sustained by the latter in the purchase and sale of steamboats, in the running of which they were interested as joint owners and proprietors: *Further*—that the balance of the account depends upon *debits* and *credits*, which the parties have never adjusted.

Mr. Justice Story, treating of *account*, as a ground of equity jurisdiction, thus states the law: "In matters of account, growing out of privity of contract, Courts of equity have a general jurisdiction, where there are mutual accounts, (and *a fortiori*, where these accounts are complicated;) and also where these accounts are on one side, but a discovery is sought, and is material to the relief. And on the other hand, where the accounts are all on one side, and no discovery is sought or required; and also where there is a single matter on the side of the plaintiff, seeking relief, and mere set-off on the other side, and no discovery is sought or required; in all such cases, Courts of equity will decline taking jurisdiction of the case." [1 Vol. Com. on Equity, 441. See also, Coleman v. Hutchinson, 3 Bibb's Rep. 210; Breckenridge v. Brooks, 2 A. K. Marsh Rep. 338; Duncan v. Lyon, 3 Johns. Ch. Rep. 360; Hawley v. Cramer, 4 Cow. Rep. 717; Southgate v. Montgomery, 1 Paige's Rep. 41; Miller v. Lord, 11 Pick. Rep. 11; Foster v. Wilber, 1 Paige's Rep. 537; Smith v. Marks, 2 Rand. Rep. 449; Fowle v. Lawrason's Ex'r 5 Peter's Rep. 495; Nelson v. Allen, 1 Yerger's Rep. 360.] The same learned author also says, that cases of account between tenants in common, between joint tenants, between part owners, between part owners of ships, and between owners of ships and the masters, are peculiarly within the jurisdiction of Courts of Chancery. "They all involve peculiar agencies, like those of bailiffs or managers of property, and require the same operative power of discovery, and the same interposition of equity." [1 Vol. Com. on Eq. 446.] *Again*—(in his Treatise on Part-

nership, 631–2)—he considers part owners as tenants in common, and as such, entitled to an account of the earnings and profits of the ship. "But," says he, "at law, there is no small embarrassment in their proceeding to compel an account of the earnings and profits, which have been received by some of the part owners, who refuse to render an account. The ordinary remedy in cases of this sort is by a bill in equity, to which, in general, all the owners should be made parties, either as plaintiffs, or as defendants. We say the ordinary remedy, and to which all should be made parties, because there may be cases in which one of the part owners, or the ship's husband, or any other agent may have entered into an agreement, by which he may bind himself to account with each of the part owners, severally, for his separate share of all proceeds and profits in his hands; and such an agreement, under such circumstances, may entitle each part owner to maintain an action at law for such share; and if that should fail or be found inadequate, it will entitle him to maintain a separate bill in equity for an account thereof, without making the other part owners parties."

The matters of account between the complainant and Findren must have been complicated, embracing the transactions of several years, relating to the employment of several steamboats upon their joint account, and made up of many charges for and against each other. In this view, the case as against Findren, is proper to be considered in equity; and when we add the fact, that the complainant and himself were joint owners, the jurisdiction of that tribunal cannot be disputed, if the authorities cited are to be recognized.

But it is insisted, that although the decree may be sustained as to Findren, the Messrs. Kirkman were improperly joined as defendants with him. To sustain this argument, we have been referred to a familiar class of cases, which determine that a creditor cannot have the aid of a Court of equity to enable him to enforce the collection of a *legal* demand, or to give him the benefit of the estate of the debtor in the hands of a third person until he has exhausted his legal *remedies*. This principle is clearly stated in the cases cited for the plaintiff in error. [See also, 1 Paige's Rep. 305; 4 Monr. Rep. 581; 3 Munf. Rep. 521; 3 Litt. Rep. 427; 4 Ohio Rep. 125; 3 Leigh.

Rep. 299; 1 Dana's Rep. 516; 2 Id. 98; 4 Paige, 309.] But does it apply to a case in which the demand is primarily enforceable in equity? Is it not competent for the complainant in such case to ask a decree against his debtor, and in the same bill to seek to subject debts due to the latter, to its payment? [Donovan v. Finn, et al. Hopk. Rep. 59; Halbert v. Grant, 4 Monr. Rep. 583; Moore v. Simpson, 5 Litt. Rep. 49.] However this may be uninfluenced by statute, we think the remedy adopted in this case is in analogy to that authorized by our attachment law, and on that ground we think the jurisdiction of Chancery may be supported as against all the parties to the bill. And the same conclusion must be attained whether the complainant reside within the State or not.

The ninth section of the act of 1833 "concerning attachments, (Clay's Dig. 57, § 9,) enacts, that when one non-resident is indebted to another, and removes his property into, or holds property in this State, which would be subject to an attachment for the benefit of a resident of this State, the same benefit shall be extended to such non-resident, as is by law secured to persons residing within this State: *Provided*, that security residing in this State shall be given as in other cases; and in addition to the oath required in other cases of attachment, the plaintiff, his agent, &c., shall swear, that the defendant has not sufficient property within the State of his residence, within the knowledge or belief of the plaintiff, &c., whereupon to satisfy the debt on which the attachment issues." By the thirty-first section (Id. 61, § 31,) it is declared that it shall not be necessary for the person suing out an original attachment, to state in the affidavit, that the plaintiff therein is a citizen of this State; and whenever an attachment shall be issued in favour of any one not authorized by law to sue out the same, it shall be abated on plea of the defendant, supported by affidavit. It is further provided that the attachment law shall not be strictly or rigidly construed. [Id. 59, § 17.] The nineteenth section (Id. 59, § 19) authorizes an attachment to be levied in the hands of a third person, who will be thereupon required to state upon oath what he is indebted, &c. to the defendant.

In the case at bar it is distinctly alledged that Findren is a non-resident, is insolvent, and the complainant has no other means of obtaining satisfaction of his demand, than by sub-

jecting the fund in the hands of T. & J. Kirkman to its payment. These and all other facts stated in the bill are verified by the complainant's affidavit. In addition to this, the complainant under the *fiat* of the Chancellor entered into bond with surety, conditioned, to pay Findren all damages, &c., and to abide by and perform the decree made in the premises. This being done, the injunction issued to restrain the Messrs. Kirkman from paying over to Findren, &c., the money which they held to his credit. These proceedings are strictly analagous to those required by statute previous to suing out an attachment, and if the party who has an equitable demand cannot be permitted to attach by suit in equity, the debt or property of his debtor in the hands of a third person, a Court of Chancery must be too restricted in its powers, to afford the redress which the law forum administers in an analagous case. This would be to reverse our notions of the liberal and extended jurisdiction exercised by Courts of equity in advancement of justice. Chancery comes in aid of the Courts of law, and affords a remedy where the latter tribunals cannot apply the law, or the redress there had is inadequate. In such cases it never opposes law, but gives effect to it, as nearly as may be, consistently with the nature of its proceedings. Carrying out these principles, we think the jurisdiction of equity as it respects the Kirkmans, if all other grounds failed, might be rested upon this, viz: the statute gives to one non-resident the remedy by attachment for the collection of a *legal* demand against another, which may be levied by garnishment in the hands of a third person; and by analogy Courts of equity must afford the same facility of collection to a creditor whose claim is of an equitable nature.

The order of reference to the register is general, viz: of "the matters of account" between the parties, without giving any direction as to the mode of taking testimony, whether any should be taken, or whether the same should be specially reported. Under this reference it was competent for either of the parties to lay before the register, the books showing the state of accounts of the proprietors of the "Mohawk," for the business season of 1833 and '34; and also to examine witnesses *viva voce*, in aid or explanatory thereof. In Remsen v. Remsen, 2 John. Ch. Rep. 495, the Chancellor after noticing

the doubt which existed previous to Parkinson v. Ingram, 3 Ves. Rep. 603, whether the master could examine a witness, says, it was declared in that case to be the settled practice for the master to take the examination on references before him. *Further*—says the Chancellor,—"The books assume the practice to be settled, that the parties and witnesses are to be examined before the master upon written *interrogatories;* and that in the case of the examination of a party, the interrogatories are settled by the master, and in the case of a witness, they are settled by the counsel." "But though the exhibition of interrogatories, duly settled, be the usual mode of examination, appearing in the books, I do not apprehend that it is indispensable. The practice with us, as I have reason to believe, has been more relaxed, and oral examinations, have frequently, if not generally prevailed. This appears to me to be a question merely of convenience, and does not involve any principle of policy, or of right; but whether examinations shall be secret, and to what extent they shall be carried, suggests much more important considerations." The opinion of the Court is concluded, by laying down some well matured rules, deduced from the books, by which examinations before the master should be conducted. [See also 3 Paige's Rep. 160.]

In the matter of Hemiup, 3 Paige's Rep. 305, it is said that the master should not report the evidence when it was referred to him to draw certain conclusions of fact. When the Court refers it to him to examine and report as to the existence of a fact, or as to any other matter, it is his duty to draw the conclusion from the evidence produced before him, and to report that conclusion only. [See also 1 Molloy's Rep. 54; Id. 187.] And it has been held that a master in Chancery or commissioner substituted for him, *pro hac vice*, sometimes exercises greater powers, according to the practice of some of the States, than are exercised by a master in England. [Farmer and another v. Samuel, &c., 4 Litt. Rep. 187.]

It is provided by statute, that, "if a decree cannot be given on the merits of the case, until all matters of account between the parties are referred, then the same shall be referred and ascertained before the hearing, under such rules as the Court may prescribe." [Clay's Dig. 352, § 43.] The forty-fourth

rule for the regulation of the practice in Chancery declares, that "exceptions to testimony admitted by the register must be taken before him, and certified in his report; if not so taken the exception is waived." [2 Ala. Rep. 17.]

The report affirms that the register had carefully examined "the verified statements of the parties in connection with the books of the steamboat 'Mohawk,' together with the proof presented by the parties on either side, to sustain their respective accounts;" and as the result of such examination, he states the accounts between the parties, and deduces the balance due to Findren by T. & J. Kirkman. None of the proof is embodied in the report of the register, nor does it appear from the record that any exception was taken to its admission. We cannot then, undertake to determine from the case as presented to us, whether the Chancellor erred in either of the points excepted to, save that which relates to the charge of interest. As to that, the report is sufficiently explicit in showing on what basis it rests. It states that the books of the "Mohawk" were balanced on the 7th of December, 1835, near eighteen months after the exhibition of the complainant's bill, and on that day there remained in the hands of the Messrs. Kirkman the sum of eighteen hundred and fifty-five 04-100 dollars, Findren's dividend of the earnings of the boat. The record does not inform us that they at any time proposed to bring this sum, or any part of it into Court, or in any manner place it under its direction. In fact, at the time their answer was filed, (June, 1835,) they were unwilling to admit their accountability to Findren to any amount—state that suits were then pending against the proprietors of the "Mohawk" for the loss of, or injury to goods, the transportation of which they had previously undertaken, &c. When these points were determined, (except the one which had been instituted in Louisiana,) we are not informed. That was decided in June, 1836, in favor of the defendants, and for any thing appearing to the contrary, the actions which had been brought in Tennessee, and in which the defendants were also successful, may have been determined previously. Under this state of the case are the Messrs. Kirkman chargeable with interest from the time they had realized the amount due the owners of the boat and balanced the books?

It has been said to be agreeable to law, and "just and reasonable in itself, that the defendant who retains and applies the money of another to his own use, should pay interest for that use." [The People v. Gasherie, 9 Johns. Rep. 71.] So where money is received to which another is entitled, and retained by fraud, interest should be calculated from the time when it was received—(Dodge v. Perkins, 9 Pick. Rep. 388)—and the same result follows when the money received is illegally claimed and withheld from the plaintiff. [Greenby v. Hopkins, 10 Wend. Rep. 97.] If one receives interest upon the money of another, or derives an advantage to himself from its retention, he should pay interest to the owner. [Lamb v. Lamb, 11 Pick. Rep. 374.] Where an account has been liquidated and the balance ascertained by the parties, interest will be allowed thereon, unless the payment is delayed by agreement. [Walden v. Sherburne, 15 Johns. Rep. 409.]

The vendee of land to whom a conveyance has been made and possession delivered, cannot excuse himself from the payment of interest, upon the ground that he was prevented from paying the principal, by a third person who set up an adverse claim, and commenced a course of litigation which continued for ten years, and was then determined in favor of the vendee's title. [Selden v. James, 6 Rand. Rep. 465.] To excuse the vendee in such case from paying interest, it is said not to be enough that he should be ready and willing to pay the principal; but it should appear that he kept the money, useless and unproductive, by him—(Id.) The case of Brockenbrough v. Blythe's exr's, 3 Leigh. Rep. 619, goes even farther than this, and maintains, that in order to relieve himself from the payment of interest, the vendee should give notice to the vendor that he has kept the money idle.

Any trustee will be chargeable with interest if he has made interest, used the money, or is guilty of laches or neglect. [Carroll v. Connett, 2 J. J. Marsh. Rep. 303; Cassell v. Vernon, 5 Mason's Rep. 332.] And it has been held, that if an agent does not in a reasonable time apply money to the purposes for which it was received, he will be liable to pay interest. [Harrison v. Long, 4 Dess. Rep. 110.] So if one man retains the money of another, the presumption is, that he kept it for the purpose of profit, and that he should therefore

pay interest on it. [Simpson v. Feltz, 1 McC. Ch. Rep. 220.] In Miller v. Beverly, 4 H. & Munf. Rep. 416, it was held that a trustee was liable to pay interest on the trust money in his hands, unless he can show that it was necessarily kept in hand for the purpose of the trust; this he may do upon oath, subject to be controlled by other testimony and the circumstances of the case; and in such case interest is calculated from the time the money was received. But the case more strikingly analagous to the one before us, is Shackleford v. Helm, 1 Dana Rep. 338, in which it was determined, that a debtor is not excused from the payment of interest, because the debt is attached in his hands by bill in Chancery; unless he bring the money into Court, or is enjoined from using it. So it has been decided, that an officer of Court who has money in his hands, raised by the sale of attached effects, which the Court forbade him to pay over, shall pay interest, unless it appear that he kept the principal by him. [Hunter's Exr's v. Spotswood, 1 Wash. Rep. 145.] See further upon the question of interest, Jones v. Williams, 2 Call's Rep. 106; Taylor v. Knox's exr's 1 Dana's Rep. 398; 9 Johns. Rep. note (a) 72, and cases there cited; Reid v. Rensalaer Glass Factory, 3 Con. Rep. 393, and cases there cited; Bass & Carter v. Gilliland's heirs, 5 Ala. Rep. 761.

We have been thus particular in noticing the adjudications upon this point, because the case is one of importance in itself, and as it respects the right of the complainant to recover interest under the circumstances, almost *res integra* in this Court. The case cited from 1 Dana, 338, goes quite beyond what the facts of the present require, in order to charge the Messrs. Kirkman with interest. There the party retaining the money did not set up a claim to it, or deny his liability to account for it;—here they did not admit that they were chargeable for moneys belonging to the complainant's debtor, but insisted upon the right to retain whatever they might collect upon the accounts due to the owners of the "Mohawk." No injunction was awarded to restrain the use of the dividend of of Findren; as the Messrs. Kirkman did not concede his right to it, but insisted they were entitled to its control, it is perfectly clear that they are accountable for interest. The presumption cannot be indulged, even if it would avail any thing, that

the money was kept idle, but it should rather be intended that it was actively employed—whether profitably or not is wholly unimportant.

Conceding that all the suits which had been brought against the proprietors of the "Mohawk" for losses sustained by the shippers of goods, were pending on the day, from which the register charged interest, and still as the Messrs. Kirkman denied that they held any funds to which Findren was entitled, they would not occupy a more favorable attitude. If they had admitted a liability, either absolutely or *sub modo*, then perhaps the Court might have made some order in respect to the money which would have protected the rights of all parties, and made it productive until they were finally adjusted. This admission not being made, as already observed, there was an assertion of the right to use the money, which is enough to authorize the charge for interest; which, according to the reason of things, and at least one of the authorities cited, should be calculated from the date of its reception.

It is said to be a general rule, that a cross bill must be brought before publication has passed in the original cause, unless the plaintiff in the cross bill, will go to the hearing upon the depositions already published. This rule is intended to prevent perjury, &c., in case the parties should after publication of the former depositions and proof, be permitted to examine witnesses *de novo* touching matters, to which they or others have been already examined. But publication will be postponed for the purpose of enabling a defendant to file a cross bill upon a special application showing sufficient grounds for such an order. When an original and cross bill are filed, both causes usually proceed to a hearing together, which could not be done, if the cross bill were filed after publication in the original cause, unless the cross bill were heard on bill and answer. [Story's Eq. Plead. 315.] Mitford in his Treatise on Pleading, (81) says, a cross bill is a bill brought by a defendant against a plaintiff or other parties in a former bill still pending, touching the matter therein litigated. [See also Galatian v. Erwin, Hopk. Rep. 58.] Such a bill may set up additional facts not alledged in the original bill, where they constitute part of the same defence, relative to the same subject matter. [Underhill v. Van Cortlandt, 2 Johns. Ch. Rep. 339.] But

it must be confined to the subject matter of the bill. [May v. Armstrong, 3 J. J. Marsh. Rep. 262.] A bill which does not pray that the cause may be heard at the same time with another, and one decree be had in both, is not in form a cross bill. [Wright v. Taylor, 1 Edwds. Rep. 226.]

Subpœna should be served upon the filing of a cross bill. [Anderson v. Ward, 5 Monr. Rep. 420.] Such a bill cannot contradict the assertions contained in the original answer. [Hudson v. Hudson's Ex'rs. 1 Rand. Rep. 117.]

White v. Buloid, (2 Paige's Rep. 164,) is a leading case upon the law in respect to cross bills, and determines several points pertinent to the case before us. Among other things, it is said not to be a matter of course, to stay proceedings in the original suit in any case, unless the defendant in the cross bill is in contempt for not answering; if it be not filed before, or at the time of answering in the original suit, the delay must be accounted for, or the proceedings will not be stayed; it is not too late to file a cross bill after the proofs in the original suit are closed, if the complainant in the cross bill is willing to go to a hearing on bill and answer as to the cross suit; but the delay of the complainant in the cross suit will not be permitted to delay the hearing of the original cause. [See further, Mitf. Plead. 83, note 1, and cases there cited.]

Without stopping to inquire whether the matter of the bill filed by the Messrs. Kirkman is the proper subject of a cross suit, it may be enough to say, that although it recites the pendency of the original cause, yet it does not pray that it may be regarded as a cross bill, or that the suits may be brought to a hearing at the same time;—it was filed after the order of reference and report of the register in obedience thereto; all which are tantamount at least to publication, and in fact pre-suppose it. In addition to this, it may be remarked, that the bill does not ask an injunction, or other order, to stay proceedings in the original cause, nor was any such order made; nor did the complainants therein, propose to submit to a hearing on bill and answer. In this predicament of the cause, the Court might with strict legal propriety, have refused to consider the bill of the Messrs. Kirkman as a cross suit. If it can be regarded as an original independent bill, and as such, was prematurely

dismissed, the decree of dismissal cannot be revised on the writ of error in the present case.

It may be questioned whether the *onus* of proving the insolvency of Findren could be thrown upon the complainant in any other manner, than by an express denial of the fact, either upon knowledge or belief; the allegation being made merely for the purpose of giving jurisdiction, its truth perhaps would be presumed unless denied. Be this as it may, the fact of insolvency must under the circumstances of this case, if it exist, be known to the Messrs. Kirkman, and a failure to deny it will operate as an admission of its truth.

This view is decisive of all the points presented upon the record; the result is, that the decree of the Court of Chancery must be affirmed.

REPORTS

OF

CASES ARGUED AND DETERMINED,

January Term, 1845.

DUBOSE v. DUBOSE.

1. No inference of fraud arises upon a deed of trust, conveying property for a debtor as an indemnity to his sureties, from the circumstance that the property is to remain in the trustee's possession, until he may choose to sell or be required to do so by the beneficiaries of the deed.
2. Any execution creditor, independent of the statute right of payment, may compel creditors secured by mortgage or deed of trust, to close the trust by sale, and distribute the surplus if any will be the probable result of a sale; and, without such probability, upon indemnifying the other party against the costs of suit and sale.
3. A discretion given to a trustee, who is also the surety of the grantor, and for whose indemnity a trust is created, to pay first either of two debts, for both of which he is liable as surety, warrants no inference of a fraudulent intention.
4. A direction in a deed of trust, which does not appear to have been made by an insolvent debtor, or one in failing circumstances, that the land conveyed by him shall, until its sale under the trust, be cultivated by the slaves conveyed and such others as the trustee may procure, does not make the deed fraudulent as against a creditor subsequently suing out execution.

Writ of error to the Circuit Court of Marengo County.

DETINUE by James H. Dubose against Joel Dubose for certain slaves.

At the trial, it was shown in evidence that the defendant, as sheriff of Marengo county, on the 8th of November, 1842, seized the slaves in controversy, as the property of Isaiah Dubose, by virtue of a *fieri facias* against him at the suit of one Maywood, issued the same day. The slaves, at the time of levy, were in possession of the defendant in execution, and had been so, as his property, for many years.

The plaintiff introduced as evidence, a deed made on the 14th of October, 1842, by the said Isaiah Dubose to him James H. Dubose, in trust for himself—who resided in Marengo county—and for Cyrus Bacot, Wm. Wingate, Wm. E. Dargan, and Hopkins G. Charles, of South Carolina—all these persons were sureties for the said Isaiah. Also, in trust for Martin Waller and Alfred L. Barton, of South Carolina, creditors of the said Isaiah. These several parties appear from the deed, to be liable for, or creditors of the said Isaiah, as follows:

1. Isaiah as principal, and James H. and one K. C. Dubose as sureties, owed the Branch Bank of Alabama at Mobile, $3,000.

2. Three judgments, all rendered in a court of South Carolina in favor of Clement D. Wallace, as guardian, &c., one of them against Isaiah Dubose, principal, and Cyrus Bacot, Hopkins G. Charles and William E. Dargan, sureties, on a bond made by them and said James H., also a surety, $14,020 16.

Another against Isaiah, as principal, and K. C. Dubose, Hopkins G. Charles and William E. Dargan, on a bond made by them and said James H., also a surety, $14,549 25.

The other against Isaiah, the principal, and K. C. Dubose, Wm. Wingate, Hopkins G. Charles, and Wm. E. Dargan, on a bond made by them, and the said James H., also a surety, on which a balance was due, $2,897 10.

No judgment was rendered on these liabilities against James H. Dubose, but for them he gave his separate bond to Wallace for $10,000, to secure the payment of his proportion.

3. Isaiah Dubose is indebted to Martin Waller, $5,500:

4. And to Alfred G. Barton about $10,000.

5. The said Isaiah is also for a valuable consideration bound to pay the balance due on a note, made by said James H. Dubose, as principal, and others as his sureties, to the Branch of the Bank of the State of Alabama at Mobile, 3,000.

The deed, after the recital of this indebtedness, then conveys to James H. Dubose, about 4.700 acres of land in Alabama, including a plantation in Marengo county—thirty or more slaves, including those in controversy, horses, mules, plantation utensils, implements, &c., "and all the crops of corn and the cotton which is now upon the said plantation as well that which may be now in the field, as that which may have been gathered," (excepting from the conveyance a part which had been previously conveyed,) to have and to hold upon the trusts following, to wit:

That the said James H. "shall enter upon and take immediate possession" of the property conveyed, and "forthwith, or as soon as it may become necessary, to protect him, or all, or either of the parties of the third part;" or on the request of all or either of them he shall, in the manner prescribed, sell all or such part of the property "as may be necessary to protect from loss or injury and save harmless, either himself, or all, or any of said parties;—(The cotton to be sold in the usual manner, and the other property at auction;)—and the proceeds to be applied by him as afterwards directed." And until the whole of the real and personal property is sold, the said James H. Dubose shall continue to cultivate said plantation, or such part as may remain unsold, with the negroes which may be upon the said land, or such other negroes as he may procure, in such manner as may be most advantageous and profitable." "And the proceeds arising from all such sales of the crops, or of the real and personal property, or any part thereof, he shall first apply to the payment and discharge of these debts, aforesaid, on which the said James H. is individually liable or jointly with either of the aforesaid parties of the third part; to be selected by him at his discretion. That is to say, he shall first pay off and discharge the said two debts due to the Branch of the Bank of the State of Alabama at Mobile; unless he shall prefer to pay the said debts due to the said Wallace before the payment of the said debts due to the said Bank;—he shall then pay off the said debts to the said Wallace;" and afterwards shall pay the debts due to Martin Waller and to Barton, &c.

The defendant objected to the introduction of this deed as

evidence, on the ground that it contained provisions which showed it to be fraudulent on its face.

This objection was overruled, and the Court allowed the deed to be read to the jury, and instructed them that it was not fraudulent on its face. The defendant excepted to the refusal to exclude the deed, as well as to the charge of the Court, and both are here assigned as error.

Manning and Brooks, for the plaintiff in error, argued that the deed is fraudulent and void.

1. Because it gives to the trustee discretionary power to pay certain debts in preference to others.

2. Because the interest of neither creditors nor sureties are fixed and determined by the assignment.

3. Because it places the creditors and sureties under the power and control of the assignee.

They cited Gazzam v. Poyntz, 4 Ala. Rep. 374; Barnum v. Hempstead, 7th Paige, 518; Clark v. Hyslop, 14 John. 458; Garland v. Rives, 4 Rand. 282; Ward v. Trotter, 3 Monr. 315.

J. T. Lomax and F. S. Lyon, for the defendant in error, insisted—1. That the case has no resemblance to that of Gazzam v. Poyntz, in which the deed was held void, because the trustee was invested with power to prefer one creditor before another. In this the preference is directed in the deed to be given to the debts due the Bank in the first instance, unless the assignee, who is liable as surety for them and other debts, shall elect to pay the other debts first. The power here given is not a discretion to the trustee, but a privilege awarded to a secured creditor, who without the clause to that effect could waive it at his pleasure. Neither the Bank nor Wallace have any interest under this deed, not being parties to it. [De Wolf v. Chapin, 4 Pick. 59.]

2. The object of this deed was to indemnify the parties named as the sureties of the grantor; and afterward the individual creditors designated. The liability of a surety is a valuable consideration to support a deed. [Stephens v. Bell, 6 Mass. 339.]

3. The question is, whether the deed is valid as a security between Isaiah Dubose and his sureties, as it was executed

for their indemnity. An assignment by a debtor to one surety to pay all surety debts is valid; and if he is called on by a creditor not provided for, the trustee may retain for all payments on account of his liabilities; or for which he might still be liable as surety. [Ripley v. Severance, 6 Pick. 474.]

MANNING and BROOKS in reply.—A creditor is entitled to the benefit of all securities which the principal has given to his sureties. [Pitman on Principal and Surety, 40 Law Lib. 73; Manse v. Harrison, 1 Eq. Ca. Ab. 93, 11 Vesey, 12; Hyslop v. Clark, 14 John. 463.] Therefore the discretion given the trustee to select between the Bank and Wallace might be prejudicial to the former.

GOLDTHWAITE, J.—1. We shall consider the charge asked for by the defendant as intended to elicit from the Court the opinion, that this deed, for matters apparent on its face, is fraudulent and void *as against the creditor of the grantor;* but stating it even in this manner, we think its refusal was correct.

The object of this conveyance, as expressed on its face, is, that the grantor being "willing and anxious fully and completely to secure, indemnify and protect the said James H. Dubose, and the several parties of the third part, in the payment of the specified debts, and to relieve the said securities from any and all loss, risk, cost, charge, or liability, arising from the said liabilities upon the said debts; and the more certainly to provide a fund for that purpose," therefore conveys the property therein described, to the debtor's principal surety, upon the trusts of which an abstract is presented in the statement prefixed to this opinion.

If the expressed intention of the grantor is carried into effect, it is difficult to conceive the idea of a legal fraud; for no creditor is hindered or delayed, any further than that a preference is given to those named. The trustee is required to sell the trust property *forthwith;* or so soon as it may be necessary to protect himself or either of the parties to the deed, from injury: and then, as if fearful of confiding to him the discretion to judge of the time when injury might happen, he is directed, upon the request of either of the parties of the

third part, to sell such part of the trust property, as may be necessary to protect them from loss or injury.

2. It is argued however that their request may be indefinitely postponed, or even never made; and that thus, the trust property may be preserved for the use of the grantor against the attacks of other creditors. If this proposition could be maintained it would almost be conclusive against the validity of such a transaction. But, independent of the statutory right, which is given to any execution creditor to pay the indebtedness disclosed by the trust deed, and thus render the estate subject to his execution, (Clay's Digest, 256, § 6,) we think that any execution creditor can. by suit in equity, compel the preferred creditors to close the trust and distribute the surplus. This seems to be the result of certain other propositions, and was put as a *quere* in the recent case of Graham v. Lockart, supra, without any particular examination of the principles involved in it. We propose now briefly to consider them.

In England, from whence we derive our general ideas of mortgages, real property has a fixed value, to a great extent, and is not subject to the fluctuations incident to our own country, where land is so abundant and where personal prorperty is often more productive. This difference in the condition of the two countries has introduced into this a modification of many of the rules which formerly applied to conveyances, intended as securities merely. Thus, in our Courts, although the complainant proceeds for a strict foreclosure, the defendants may, in general, insist on a sale. We say in general, because it may not always be the rule, as there seems to be no sufficient reason to tax the property with the costs of a sale, where it clearly is insufficient to pay the debt, for which it is mortgaged, and the creditor is willing to extinguish the debt by a foreclosure. However the exception may be, it seems clear that the general rule is as stated. [2 Story Eq. 292, § 1025, 1026; 4 Kent, 1 ed. 156; Hitchcock's heirs v. Bank U. S Mss.]

As then the defendants to a mortgage bill may insist on a sale, instead of a strict foreclosure, it seems to follow, that any one entitled to redeem may insist upon a sale in the same manner. The mortgagor may be enabled to redeem the premises by a payment of the debt, even where that and a surplus

beyond, would be realized from a sale; and yet, if the creditor has the right to refuse a sale without payment, the risk of destruction and depreciation in value would remain with the debtor. On the other hand, conceding the estate not to realize the debt and costs, the latter only would be hazarded by a sale; for the mortgagee would always be a privileged purchaser to the amount of his debt. The risk of the costs of the sale could generally be ascertained by a reference to the master, and the sale refused, if indemnity for these was not given. [See cases before cited, and also Story on Bailments, 219, § 320.]

There is another cogent reason why an unpreferred creditor should be allowed to compel one secured by mortgage to close it at once, immediately connected with the risk of destruction and depreciation of value of the mortgaged estate. The debt would remain as a charge against the debtor, notwithstanding the depreciation or destruction of the property; and as the mortgage creditor, in the event of the debtor's death, and possibly in some other instances also, would be let into distribution with other creditors for the sum remaining due after exhausting his security, the risk is thus in effect thrown upon those other creditors.

The remarks we have made as to mortgages apply with equal force to conveyances in trust, and perhaps with greater; as the beneficiary in such has no estate in the trust property, and the resulting trust is with the mortgagor. The right to ascertain and subject this resulting trust pertains to any execution creditor, who otherwise can not obtain the fruit of his execution. [Park v. Clinton, 12 Vesey, 59. See also Desha, Sheppard & Co. v. Wilson, et als. at the present term.]

We thus answer the principal objection to this deed, and have endeavored to show that no estate, whether real or personal, by mortgage or deed of trust, can be placed beyond the reach of an execution creditor, if a surplus beyond the secured debt will be the probable result of closing the trust; and that it may be closed by any such creditor, whenever there is no such probability, upon indemnifying the other party against the costs of suit and sale.

We do not think the inference of a fraudulent intention can be drawn from the discretion which is given to the trustee to

first pay either of the named creditors. He is the surety for both the debts, and the deed is made chiefly for his indemnity; the trust, in the first instance, is to pay the debt to the Bank, and for this the trustee is the only one of the beneficiaries liable. When, therefore, a discretion is given him to pay the other debt first, it amounts to nothing more than he would have the right to do, without the expression of the power, unless, as contended, the Bank is by the deed, invested with an absolute equitable right to priority.

3. Conceding the proposition asserted in this connection, that a creditor is entitled to the benefit of all the funds or property assigned to his debtor's surety, it cannot be said that the creditor is entitled beyond the condition of the assignment. Here, the condition is, that the surety liable for both debts, shall elect which shall first be paid. We deem it too clear to admit of illustration, that such a discretion involves no intention of fraud.

4. Another argument against the deed is, that the trustee is permitted to cultivate the land until sold, with the slaves which may be upon it, or such others as he may procure. This, it is said, involves the trust estate with the expenses of the slaves so procured, and therefore the property is not fairly appropriated for the indemnity of the sureties or creditors. This is answered, to some extent, by showing that all trusts of this nature may be closed at the instance of any execution creditor; and therefore no delay, prejudicial to him, can arise out of it. But independent of this, there is no reason why a debtor who is not insolvent, or in failing circumstances, should not provide for such an employment of his property. Until other rights intervene, he may do as he pleases with his estate, and it is no lawful prejudice to any one. Here we never hear of any other creditor than those named in the deed, until the levy of Maywood's execution; and that does not affect the conveyance made at a time when he was without a legal right to coerce payment.

We can see no error in the record.

Judgment affirmed.

OGDEN, WADLINGTON & CO. v. POWELL.

1. To justify a sheriff in discharging a levy already made, or in refusing to levy because the plaintiff in execution did not at his requisition execute a bond of indemnity, he must show that a doubt exists of the title of the defendant in execution to the property, by proving, either that the title to the property is in another, or that some third person asserts a title to it.

Error to the Circuit Court of Coosa.

THIS was a motion against the defendant as sheriff, by the plaintiffs in error, and comes before this Court on a case agreed, presenting the following facts: The plaintiff and A. Pope & Son, each obtained judgment against one Holman F. Simmons at the same term of the Court. Executions were issued on both judgments, came to the sheriff's hands, and were levied on a female slave, a slave named Ben, a wagon and pleasure carriage, as the property of Simmons. A third person set up a claim to the female slave, the carriage and wagon, but asserted no title to the negro Ben, who at the time of the levy, and long before, was in the possession, under the control, and ostensibly the property of the defendant in execution. The slave Ben was sold under the levies. The sheriff, a short time after the levy, required by notice in writing from Pope & Son and the plaintiffs, a bond of indemnity for his protection in selling the slave under the statute. Pope & Son executed a bond of indemnity, but the plaintiffs failed to execute any. The plaintiff proved a demand of the sheriff, and refusal.

Upon this state of facts, the Court decided that the plaintiff was not entitled to any of the proceeds of the sale of the slave, and gave judgment for the sheriff, from which this writ is prosecuted. This is now assigned as error.

MORRIS, for the plaintiff in error, relied on the statute. [Clay's Dig. 209, § 44; 210, § 50.]

ORMOND, J.—At common law the sheriff has the power to impannel a jury to inquire as to the title of property supposed to belong to the defendant in execution. The law sup-

posed that the verdict of the jury would ascertain the fact, so as to enable him to act without risk; but if it turned out that the property did not belong to the defendant in execution, the verdict would not protect him against an action of trespass by the true owner, though it would have justified him in returning *nulla bona*, if the jury had found that it did not belong to the defendant in execution. [Glossop v. Pole, 3 M. & S. 175.] As therefore the sheriff must act at his peril, where a real doubt exists as to the title of the property, so as to make it hazardous for the sheriff to act, either by selling, or refusing to sell, the Court will protect him by enlarging the time for making his return, until the parties indemnify him, or by a suit settle the title.

The Court will not, however, interfere except in cases of real doubt, and difficulty. In the case of Wells v. Pickman, 7 T. R. 177, Lord Kenyon says, "It has been said, that if the present application be successful, we shall establish a general rule, that where there are contending parties, the Court will interpose in all cases in favor of the sheriff, but I desire to have it distinctly understood that we lay down no such general rule; each case must depend on its own particular circumstances; and here I think there is sufficient reason to induce us to interfere." So in Etcholls v. Lovatt, 9th Price, 54, Baron Graham observed, that he "considered this as one of the cases wherein the sheriff must necessarily act at his peril; for if the Court should interfere on such slight grounds, plaintiffs might frequently be injuriously delayed on pretences, and as the sheriff had the power to summon a jury for his information, he ought to be compelled to make his return forthwith." [See also Saunders v. Bridges, 3 Barn. & A. 95.]

In this State the Legislature have acted on the subject. In 1807 an act was passed to the following effect: "If any sheriff shall levy an execution on property, and a doubt shall arise whether the right of such property is in the debtor or not, such sheriff may apply to the plaintiff, his attorney or agent for his bond, with good security, for indemnification for the sale of the property seized; which, if the plaintiff, his attorney or agent refuses or fails to do, within ten days after such application, the sheriff or other officer shall be justified in delivering up such property to the party from whose possession it was

taken." [Clay's Dig. 210, § 50.] And again, in 1828: "If the title to property levied on be so doubtful as to induce the sheriff to require a bond of indemnity, if the party having the prior *lien* should fail or refuse to give such bond, then the person having the next *lien* shall be authorized to give such bond, and have the property sold for his benefit." [Clay's Dig. 209, § 44.]

We cannot think that the Legislature intended to make such a radical change in the law, as to make the sheriff the exclusive judge of the "doubt," as to the title of the defendant in execution to the property levied on, and to authorize him at his pleasure to require a bond of indemnity. To justify him in discharging a levy after it is made, or in refusing to levy, because a bond of indemnity is not executed, he must show that a real doubt exists as to the title of the property. We are not to be understood, as saying, that the sheriff will have to prove that the title is not in the defendant in execution. It would be sufficient if he could show, either that the title was in another, or that some third person asserted a title to the property. The Legislature never intended that the sheriff should act upon suspicion, or conjecture, or as caprice might dictate; if so, in the language of one of the cases cited, "plaintiffs might frequently be injuriously delayed on pretences."

From this examination, it appears that there was no sufficient reason shown by the sheriff for demanding a bond of indemnity, and therefore he had no authority for discharging the levy made on the plaintiff's execution. Let the judgment be reversed and the cause remanded.

DOYLE v. BOULER.

1. A testator declared that he lent a negro girl to each of his four daughter's *nomination*, during their respective lives, at their death to go to their children lawfully begotten of their bodies; "and if any children decease leaving no heirs lawfully begotten of their bodies, their part must be equally divided among the rest of my children, and their children lawfully begotten of their bodies." After making some provision in respect to the treatment of his slaves, the testator added that "they are are only lent to my children during their lives, and given to my grand children." *Held*—that the limitation over in favor of the grand children was not too remote, and the first takers did not take an absolute estate in the slaves.
2. Where a woman who has a female slave and her increase, settled upon herself and children by her father's will, marries and survives her husband, and afterwards goes with the slaves and resides with a son of her husband for twenty years—all the time exercising the uninterrupted control over them, it cannot be assumed that the son had possession of them.
3. Where the possession of personal property, is held adversely, for a period beyond that prescribed by the laws of the State as a bar to an action, the original owner cannot successfully assert a title against such possessor, and the bar will be recognized in any country to which the property may be taken.

Writ of error to the Circuit Court of Clarke County.

A *fieri facias* issued from the Circuit Court of Clarke, at the suit of the plaintiff in error, against the goods, &c., of John Bouler, was levied on the following slaves, to wit, Robin, Charlotte, Rachel, Elvira, Julia, Betsy, Tom, Mina, Harriet, Luke, Jane, and Helen, as the property of the defendant in execution; of all whom were claimed by the defendant in error, and bond executed to try the right as required by the statute. An issue being made up, the cause was submitted to a jury, who returned a verdict in favor of the claimant, and judgment was rendered accordingly.

On the trial the plaintiff in execution excepted to the ruling of the Court. From the bill of exceptions it appears that it was shown, that the claimant was eighty years old, and is the daughter of Gabriel Toombs, deceased; she then offered as evidence a copy of the will of her father, dated the 8th day of December, 1795, which was admitted to probate on the 25th of February, 1799, in the Court of Ordinary of the County of

Wilkes, in the State of Georgia. In this will are the following clauses: "Likewise, I do give unto my wife Ann Toombs, and to my four daughters, Mary Barrett, Elizabeth Toombs, Ann Dawson, Parmelia Dawson Toombs, the tract of land in Wilkes county, lying on Beaver dam, to be equally divided among them at my wife's death: Likewise, to each of my daughters, lend a negro girl, horse and saddle, and bed and furniture, during their lives; at their death to go their children lawfully begotten of their bodies. And the rest of my estate, negroes, household goods, &c., I do give unto my wife Ann Toombs, during her life and widowhood; at her death to go to be equally divided among my six children; and if any of my children die before my estate is divided, their children lawfully begotten of their bodies stand in their place; and if any of my children decease, leaving no heirs lawfully begotten of their bodies, their part must be equally divided among the rest of my children, and their children lawfully begotten of their bodies." After making some provision in respect to the manner in which he desires his slaves treated, &c., after his death, the testator declares, that "they are only lent my children during their lives, and given to my grand children."

It was proved that the claimant married William Bouler, the father of the defendant in execution, but had never had a child, that the slaves in controversy, or their ancestors upon such marriage went into the possession of her husband. At the death of William Bouler, the defendant in execution administered upon his estate, but did not return an inventory of the slaves in question, or claim them as part of the same. Soon after the death of her husband, about twenty years ago, the testator and the slaves went to the defendant's house, where they have ever since remained. William Bouler was the father of four children, by a former marriage, of whom the defendant in execution was one, all living at the time of his death; that there had never been a division of the slaves between them, or any other division of, or administration upon them.

Upon these facts, the plaintiff prayed the Court to charge the jury, that whatever interest William Bouler had in the slaves in question, descended to his heirs and representatives; and that the defendant in execution had an interest, that could be levied on and sold. The Court refused thus to charge, and

instructed the jury, that the plaintiff's execution could not be levied on the negroes, but they belonged to the estate of Wm. Bouler, deceased; that if they had been administered on, and the defendant had received his distributive share, that share would be subject to the execution.

It was further shown that one of the daughters of Gabriel Toombs married a man named Dawson, but is dead; that Robert T. Dawson is a son of that marriage, by whom the claimant proposed to prove certain facts, and who was permitted to be examined as a witness, notwithstanding it was objected by the defendant that he was interested, and therefore incompetent.

Leslie, for the plaintiff in error, made the following points: 1. The limitations in the will of Gabriel Toombs are too remote to operate, and the first taker took an estate which vested in her husband, and upon his death, in his administrator and distributees. [Price v. Price, 5 Ala. Rep. 581; Clay's Digest, 157, § 37.] 2. If the slaves were the estate of Wm. Bouler, the defendant in execution has an interest in them which may be sold under execution. [McGreggor & Darling v. Hall, 3 S. & P. Rep. 397; The P. & M. Bank v. Willis & Co. 5 Ala. Rep. 770.] The possession of the defendant in execution invested him with an interest that may be sold under execution. [Clay's Dig. 255, § 2, 4; 326, § 78.] 4. Dawson was as incompetent witness. [Greenl. on Ev. 427, 5.] The Court misled the jury in instructing them the slaves belonged to the intestate's estate, and then refusing to charge that the limitation in the will of Gabriel Toombs was void.

Blount, for the defendant in error. The limitation in the will was not too remote; it does not refer to an indefinite failure of heirs, but to heirs living at the death of the first takers. In fact they take nothing more than a loan of the property bequeathed to them, respectively, during life, if they have then no lawfully begotten children, the children or grand children of the testator are entitled to it.

The evidence does not authorize the assumption that the defendant in execution had possession of the slaves for twenty years or any other time. But it was satisfactorily shown that

the claimant had an uninterrupted possession for twenty years, without the assertion of an adverse claim from any source. This was certainly sufficient to give her a title against the whole world; unless those having a better right have been under a disability which prevented them from suing.

Dawson, it is clear had no interest in the controversy; for however the case might be decided his rights could not be affected. A remote interest, merely, in the question, and not in the event of the suit, does not disqualify a witness. [Bent v. Baker, 44th No. Law Lib. Eng. & Am. notes 56.]

COLLIER, C. J.—From a view of so much of the will of Gabriel Toombs as relates to the bequests to his daughters, we think it clear, that the limitations over after their death is not too remote to operate. The testator explicitly declares that, *if any of his children die leaving no heirs lawfully begotten of their bodies, their part must be equally divided among the rest of his children:* and as if to leave no doubt of his intention, and to "make assurance doubly sure," he again says, that *the negroes are only lent to his children during their lives, and given to his grand children.* The terms "heirs of the body," &c. are words of purchase in the sense in which they were used, and does not postpone the period of the failure of the first takers heirs to a period more remote than their respective deaths. This is satisfactorily indicated by the terms "die" and "leaving," as used in the first clause noticed, and the declaration in the last, that he loaned the slaves to his children, and gave them to his grand children. Meaning, no doubt, by "grand children," the offspring of the first taker, and if none were living at the death of the latter, then the share of such legatee would revert, as the will provides, to other children of the testator or their descendants. [Darden's Admr's, et al. v. Burn's Admr's and another, 6 Ala. Rep. 362.] From this view of the will it results, that William Bouler could take nothing more than an estate for the life of his wife in the slaves bequeathed her by her father. Whether this interest vested in his administrator, or his children, and could be sold to pay the debts of the latter, without being distributed to them, are questions which we need not consider, as there is another point in the cause on which we prefer to rest our judgment.

There was no proof that the defendant in execution had the possession of the slaves at any time, unless that could be deduced as a legal conclusion, from the fact, that they lived with him under the control of the claimant, who was an inmate of his family. That no such deduction can be made we think clear, especially when it was proved, that her possession was uninterrupted for twenty years. Taking this to be true, and the slaves cannot be subjected to the plaintiff's execution, conceding that the defendant as a distributee of his father's estate was entitled to a share of them during the claimant's life. It is an acknowledged principle of law, that detinue may be maintained upon the mere ground of a previous possession, originally acquired without force or fraud, and enjoyed for a sufficient length of time to make the statute of limitations an available bar. *And further*—where the possession of personal property is held adversely, for a period beyond that prescribed by the laws of the State as a bar to an action, the original owner cannot successfully assert a title against such possessor; and the bar will be recognized in any country in which the property may be taken. [See Goodman v. Monks, 8 Porter's Rep. 95, and cases there cited.]

If then the defendant in execution ever had a right to the slaves, he lost it previous to the levy of the execution by the possession of the claimant fairly acquired, and acquiesced in, for more than six years. The claimants title by prescription not only entitled her to sue for the property, if dispossessed, but it was paramount to that of all others who could not invoke the saving clause of the statute of limitations. That the defendant does not come within this latter category, appears from the fact, that he administered on his father's estate more than twenty years ago.

From this view, it results that the plaintiff in execution has not been prejudiced by the several decisions of the Circuit Court, in charging or refusing to charge the jury; and that the admission of Dawson's testimony, whether the witness was interested or not, worked no injury. The judgment is consequently affirmed.

CHANDLER, ET AL. EXR'X & EX'RS, OF CHANDLER, DEC'D, v. SHEHAN.

1. A note made by one executor of an estate and also by a third person as his surety, payable to the executors of the same estate, cannot be enforced against the surety by a suit at law, where the principal debtor in his character of joint executor is one of the plaintiffs.
2. The question of personal identity is one solely for the jury, and oral evidence is competent to show that a plaintiff is the same person as the defendant's principal.
3. The proper test to ascertain whether plaintiffs suing as executors are liable for costs *de bonis testatoris*, is that the money sued for, if recovered, will be assets of the estate.

Writ of error to the Circuit Court of St. Clair.

Assumpsit by Sarah Chandler, executrix, and Joel Chandler, Jr., and James Hampton, executors of the last will of Joel Chandler, dec'd., against Shehan as the maker of a promissory note signed by him, together with Joel Chandler and H. McCoy, payable to the executors of the estate of Joel Chandler, deceased.

The defendant, with other pleas, pleaded, "that the defendant is one of the securities of Joel Chandler, who is one of the makers of the note in the declaration mentioned, and that he as such security on the 18th of September, 1841, gave to said plaintiffs notice in writing according to the statute, in such case made and provided, requiring the said plaintiffs to sue and collect the said note as soon as the law would permit. And that the said plaintiffs did not, in a reasonable time thereafter, and after the said note became due, commence an action on said note, and proceed with due diligence, by the ordinary course of the law, to recover judgment for, and by execution to make the amount due by the said note.

The note is dated 10th September, 1840, payable two years after date, and was sued the 24th January, 1844.

Also, this further plea, to wit: that the said Joel Chandler, who is one of the makers of the note in the declaration mentioned, and the said Joel Chandler who is one of the plaintiffs

in this suit, is one and the same person, and that he, the said Joel Chandler, who is one of the makers of said note, was one of the executors of the last will and testament of said Joel Chandler, deceased, at the time said note was made, and at the time it when became due and payable, and still is, and so has been at all times since its making: and that the said Joel Chandler is the principal in the said note, and the defendant is but the security, although apparently joint maker.

The plaintiff demurred to both these pleas, and the Court sustained the demurrer to that first pleaded, but overruled the demurrer to that last pleaded; and thereupon the plaintiff took issue on it.

At the trial the plaintiffs put the note before the jury, which was all the evidence offered by them. The defendant then offered to show by oral proof that Joel Chandler, whose name appears as one of the makers of the note, was the principal, and the defendant a surety only, for him: he also offered to show by the declaration of the plaintiffs, Chandler and Hampton, that the said Joel Chandler was the principal in the said note, and the defendant but the surety. To each portion of the evidence thus offered the plaintiff objected.

Upon this evidence the Court charged the jury, that if Joel Chandler was the principal in the note and the defendant only a surety thereon, and that the said Chandler was one of the plaintiffs, they should find for the defendant.

The plaintiffs excepted to these several matters, and they are now assigned as error; as is also that a judgment for costs was rendered, *de bonis propriis* against the plaintiffs.

S. F. Rice, for the plaintiffs in error, argued:

1. The facts asserted in the plea to which the demurrer was overruled present no defence to the *note*. That is a legal engagement to the *executors* of Chandler's estate; no one can sue on it who is not executor; but it is conceived that any one may sue upon it who is executor. If the note presents a case of *legal liability* the Court ought to give a *legal remedy*. [Elliot v. Montgomery, 4 Ala. Rep. 600; Tipton v. Nance, 4 Ib. 194; Grigsby's executors v. Nance, 3 Id. 347; Kemper and Noxubee Banking Company v. Schieffelin, 5 Ala. Rep. 493.]

2. If, as asserted by the plea, Shehan is Chandler's security he has a full and adequate remedy under the act of 1828—(Clay's Digest, 532, § 8)—and under this act he can obtain a judgment against Chandler at the same time that the executors obtain one against him.

3. Chandler in this suit is not an individual, but the representative of an estate, and if dead the right to sue at law would be clearly in the survivors. [Cummings v. Edmunson, 5 Porter, 145.] And so it would pass to another representative of the estate. [Harbin v. Levi, 6 Ala. Rep. 399; King v. Griffin, Ib. 387.]

4. The matter of the plea does not go to the action as a defence, but only shows at most a suspension of the right to sue. [Rice v. Brantly, 5 Ala. Rep. 184; Prout v. Decatur Bank, 6 Ib. 309.]

5. The charge upon the evidence is wrong, as there was no evidence whatever of the identity of the plaintiff Chandler with the one who made the note. [5 Ala. Rep. 258; 6 Ib. 226.]

Pope, contra, cited Tindal v. Bright, Minor, 103; Ramsay v. Johnson, Ib. 418, and insisted there was no legal distinction between this case and those.

Independent of the fact, that one cannot become bound to himself, here there is no one to whom the principal debtor could legally pay the money. [Edwards v. Crenshaw, 14 Peter's 166; Childress v. Childress, 3 Ala. Rep. 752; King v. Shackleford, 6 Ib. 426; Douglass v. Satterlee, 11 Johns. 23.]

The judgment *de bonis propriis* at least, is no revisable error, but amendable.

GOLDTHWAITE, J.—1. The question made by the plea in connection with the declaration is, whether a note made by one executor of an estate, and also by a third person as his surety, payable to the executors of the same estate, can be enforced against the surety by a suit at law where the principal debtor, in his character of joint executor, is one of the plaintiffs.

We limit the question to the precise state of facts shown by the record, that it may be seen that we do not intend to consider what the effect of such a note would be if the declara-

tion was upon it as an express promise by one executor and his surety to his co-executors. [See Philips v. Philips, 1 Stew. 71.]

The defendant relies on the decisions of this Court in Tindal v. Bright, Minor 103, and Ramsey v. Johnson, Ib. 418, as conclusive of this part of the case; and the chief distinction between this and those cases arises from the fact, that here the promise is made to the executors of an estate, whilst in those it was to individuals in their own right. On the other hand it is insisted, that as the intention is clearly manifested by the executor who made this note, to bind himself and his surety, they ought not to be discharged upon reasons which, when examined are found to be entirely technical, but that even these can be satisfied by permitting a suit against the surety, as he has a direct remedy under the statute, (Clay's Digest, 532, § 8,) against his principal, even before the money is forced from him.

If the objections against this suit were merely technical, we should be strongly inclined, from our general course of decision, to disregard them and arrive at the substantial justice of the case, independent of technicality. But the question goes much beyond mere technical rules, and involves a principle of considerable importance, with relation to the rights of executors and administrators. An executor or administrator may become a purchaser at his own sale, as seems to be settled by the decision of Brenner v. Oliver, 2 Stewart, 47, where he has an interest. It is not so clear, where a joint administration has been granted, or a joint executorship constituted and the representatives have jointly taken possession of the article committed to their charge, and thus become individually responsible for its proper administration, that one of the executors or administrators, through the medium of a purchase, can invest himself with a title to the property without the consent of his co-representatives. It would seem to be just and proper when a purchase was made by one, if the others were unwilling to extend their liability, that he might bind himself, and consequently his surety, to the others by an express promise to pay. But however this may be, we are satisfied that a security given by one executor in which he with his co-executors is a promisee, cannot be enforced even against his surety when he is one of the plaintiffs.

In Childress v. Childress, 3 Ala. Rep. 752, a joint executor was the purchaser of some of the property of his testator's estate, and it was held, he was properly chargeable with the sum for which he gave a note. We there said, "that when an executor purchases a part of his testator's estate he is, after the expiration of the term of credit, chargeable with the amount as cash in the same manner as if he had collected money or converted property belonging to it." In King v. Shackleford, 6 Ala. Rep. 423, an executor signed a note payable to himself and his co-executor as the surety of a third person, and we held, in a suit in equity, by one executor against the other who was the surety, that the latter was not responsible to his co-executor, as the complainant did not pretend he was a creditor of the estate beyond the assets in his hands. The chief difficulty of allowing a suit against the surety arises from the circumstance, that when the promise made by his principal is considered as made to all the executors, the payment cannot be made so as to discharge the principal debtor from his official obligation. The case of Childress v. Childress, before cited, shows that after the expiration of the credit allowed by the sale, he is chargeable in the same manner as if he had received money, and Edwards v. Crenshaw, 14 Peter's, 166, shows that a payment by him to his co-executors would not discharge him from the liability to account to those entitled under the will or in course of distribution.

On the whole, therefore, though we have had some difficulty in coming to this conclusion, we are of opinion that the plea to which the demurrer was overruled presents a sufficient bar to the case made by the declaration.

2. With respect to the evidence in support of the plea, we do not see that any question arose as to the identity of one of the plaintiffs as the principal in the note. The proof adduced was certainly competent, whether oral or written, and its sufficiency was for the jury to consider. The objection to the proof of this matter by the admission of two of the plaintiffs on the record, does not seem to be pressed, and therefore is not considered.

3. It is lastly urged, that the judgment is *de bonis propriis*, when it should have been *de bonis testatoris*. In Thompson v. Start, 1 Taunt. 322, the test of the proper judgment is said

to be, whether or not the money if recovered would be assets of the estate. This we think is the true rule, particularly with reference to the modifications which the duties of executors and administrators have undergone by our statutes, though it is elsewhere held, that the party is liable *de bonis propriis*, whenever he could sue in his own name. [Haller v. Smith, 10 East. 293; Jones v. Jones, 1 Bing. 249; see also, 2 Tidd, 1014. But this at most is a clerical error which, according to repeated decisions of this Court, will not reverse the judgment but will be here corrected.

Judgment corrected so as to render costs *de bonis testatoris*, and affirmed in all other respects.

THOMPSON v. ARMSTRONG, USE, &c.

1. Although in general commercial paper in the hands of the holder imports a consideration as between the original parties to it, yet when it is shown, that it was made without consideration, or that it has been fraudulently and improperly put into circulation, the holder cannot recover without proving that he acquired the paper before it was dishonored, upon a valuable consideration.
2. A note payable to the cashier of a Bank in the hands of one who does not derive title from the Bank, imports on its face that it was made without consideration to be negotiated in Bank.

Error to the Circuit Court of Butler.

ASSUMPSIT by the defendant in error for the use of John Sutlif, on a promissory note, for one thousand dollars, payable to Andrew Armstrong, cashier, or bearer, negotiable and payable at the Branch Bank at Mobile, and purporting to be made by Benjamin Fuller, the plaintiff in error, and George H. Patillo. Fuller and Patillo not being served with process, the action as to them was discontinued.

The defendant pleaded *non est factum*, and the general issue.

Upon the trial, the plaintiff introduced the note, and evidence tending to prove the genuineness of the defendant's signature.

The defendant proved that the note was in the form which had usually been made for discount at the Branch at Mobile, at the time of its date, but that the Bank had not discounted the note. Patillo was examined as a witness and swore that he never signed the note. Fuller also gave testimony that he had no recollection of signing the note, and did not know any thing about it. Another witness proved that he saw a note similar to this in the possession of Fuller about the time of its date. There was no proof that Sutlif had given any consideration for the note.

The Court charged the jury that if they found from the proof that the signature to the note was in the hand writing of the defendant they must find for the plaintiff; and this notwithstanding they should give full credence to the testimony of Patillo and Fuller; to which the defendant excepted, and which he now assigns for error.

Cook, for plaintiff in error. In this case the question is whether the evidence was sufficient to cast suspicion upon the note. The proof was clear that there was no consideration passing between the original parties. Between them the consideration may be always inquired into. [4 Johns. 296; 7 Id. 26; 17 Id. 301; 7 Cow. 3; 2 B. & Adol. 291.]

The unusual form and evident purpose of the note, was sufficient to put any one upon inquiry. [1 Ala. Rep. 641.]

The note was not negotiable, and therefore stands as a common note under the statute. The assignee cannot deprive the maker of his defence, although he may exclude the payee's admission after his possession accrued. The note is a *chose* in action, and the right of the plaintiff depends upon the right of the payee. [2 B. & Ad. 291.]

The note is not of itself proof of a consideration, when, as in this case, it appears to have been made for a different purpose; and the plaintiff should therefore have been required to prove a consideration paid for the note. [1 Stewart, 252, 273; 10 Wend. 314; 10 Johns. 198; 1 Ala. Rep. 568; 5 Id. 347; 1 Starkie, 14; 2 Id. 171.]

JUDGE, contra. All the questions now presented were settled by this Court when the cause was last here. The note itself imports a consideration, and defendant must show that the note was put in circulation by fraud or force before plaintiff can be called on to show how he came by it. [4 Ala. Rep. 613; 5 Id. 383; 6 Wend. 615; 10 Id. 86; 12 Id. 485, 523; 13 Id. 605.]

ORMOND, J.—This note being payable in Bank is by the statute made a commercial instrument and to be governed by the rules of the law merchant. The general rule is that mercantile paper in the hands of the holder, imports a consideration passing between the original parties. When, however, this presumption is repelled, and it is shown that the instrument is made without consideration, or has been fraudulently or improperly put into circulation, the holder will be required to prove that he gave value for the note, or bill, and that he acquired it before it was due, or he cannot recover. [Chitty on Bills, 79; Collins v. Martin, 1 B. & P. 650; Marston v. Forward, 5 Ala. Rep. 347; Wallace v. The Branch Bank, 1 Ala. Rep. 565.]

In this case, it appears, that the note was made without any consideration, for the purpose of being negotiated in Bank. This was indeed indicated by its form and peculiar structure, being payable to the cashier of the Bank, through whom no title was attempted to be derived. In addition, one of the makers of the note, swore, that he never signed it, and another, that he had no recollection of ever having seen it before. Under these circumstances, the plaintiff should have been required to prove that he gave value for the note, and that he acquired it before it was due. The case of Heath v. Sansom & Evans, 2 Barn. & Al. 291, was not so strong a case as the present, and yet the Court required the indorsee to prove that he gave value for the indorsement.

The parties went to trial upon the plea of *non est factum*, and the general issue. The Court charged the jury, that if they found that the defendant signed the note, they must find for the plaintiff. As the plaintiff had not proved that he gave a consideration for the note, or that he acquired it before it

was dishonored, by becoming due, he was not entitled to recover, even if the signature of the defendant was genuine. The charge of the Court, therefore, putting the case entirely upon the genuineness of the signature, was calculated to mislead the jury.

When this cause was here before, it went off mainly upon the admissibility of one of the *co-makers* as a witness, and the precise question here considered was not, though it might have been, passed on by the Court. It is manifest that the case has never been put before the jury on its true merits, the judgment must therefore be reversed, and the cause remanded.

THE STATE, EX REL. BATTLE.

1. After a Circuit Court has disposed of the business before it, it need not continue its session until the expiration of the term as limited by law, although a jury may be deliberating upon their verdict in a criminal prosecution for a capital offence; in such case the Court is only bound to afford a reasonable time for the jury to agree upon a verdict; and if the record does not show the reverse, it will be intended that the session continued thus long.
2. Where a prisoner will not appear in Court to hear the verdict which the jury announce themselves ready to render, the Court may order a mistrial; and a direction to them to erase their verdict, as it has no other effect than the mistrial itself, cannot prejudice the prisoner; and consequently he can claim no advantage of it.

The petitioner sets forth that he was indicted in the Circuit Court of St. Clair, at the Spring term, 1842, for an assault on James Kennedy, with the intent to kill and murder. At the term holden in the Fall of that year he was put upon his trial on that indictment—that the jury which had the case in charge being unable to agree, the presiding Judge, without any authority therefor discharged them, on Friday the fifth day of the Court and before the expiration of the term.

At the Spring term, 1844, the petitioner moved the Circuit Court to discharge him for the cause above stated, but this

motion was overruled, and he was again put upon his trial. The jury to whom his case was again submitted, announced that they had agreed upon a verdict, which the Court did not receive, but directed the jury to erase their verdict. Petitioner refers to the certified copy of the record of the cause for the truth of what he alledged, and prays that a *mandamus*, or a rule *nisi* for that purpose, may be awarded to the Circuit Court, and such proceedings had as shall result in his discharge.

The entry made of the first trial recites the submission of the cause to the jury in usual form, who, it is stated, "having considered all and singular the premises, say they cannot agree as to the verdict they shall render; and it appearing to the Court here now, that it is absolutely necessary that the jury be discharged, for that the term of this Court is now closed. It is therefore considered by the Court, that the said jury be discharged, and that this cause stand for trial at the next term of this Court."

At the Spring term, 1844, the discharge of the petitioner was moved for, upon the ground that his case had been irregularly withdrawn from the jury at the Fall term of 1842; but the motion was overruled, and the petitioner again put upon his trial.

The entry made of the second trial affirms that the jury did "return into Court and announce to the Court that they had agreed upon the verdict they will render. Thereupon the said defendant, Obadiah Battle, being called into Court to be present and hear the verdict of the jury aforesaid, and abide such order as shall be made in the premises, came not, but made default. And it appears to the Court that the defendant has fled. And the defendant's counsel now here, move the Court to receive the verdict aforesaid, of the jury aforesaid, which motion was refused by the Court, the defendant not being present. And it appearing that the hour of twelve o'clock at night, on Saturday night has arrived, at which hour the time allowed by law for the sitting of this term of this Court expires, the defendant not having appeared in Court, said jury retired. The Court directs the jury aforesaid to erase their verdict aforesaid, and return the indictment to the Court, which is done: And the jury aforesaid, at the hour aforesaid, are discharged. And it is ordered that this case stand for trial, &c."

S. F. Rice, for the petitioner, argued the points made, in the petition, and cited Ned v. The State, 7 Porter's Rep. 187; Burns v. The State, 5 Ala. Rep. 227; 6 Id. 193.

The Attorney General, contra.

COLLIER, C. J.—In respect to the first ground on which the petitioner prays a *mandamus*, we would remark that in our judgment it assumes too much. It supposes that a Court must continue its session up to the very last moment of the term which the law has prescribed for its limitation, before it is permissible to discharge a jury who affirm that they cannot agree upon a verdict; and this too, although all other business before the Court may be disposed of. The terms of most of the Circuit Courts are limited, that is, have a certain time given, within and beyond which they shall not discharge the business assigned to them as Courts. But there is no obligation upon a Judge to continue his Court in session after he has disposed of the business before it, more than a reasonable length of time, to receive the verdict of a jury to whom a criminal cause has been committed, and who report their inability to agree. If the law were otherwise, there could be no final adjournment, until the last moment of the last day of the term, without a discharge of an offender whose case was before a jury undetermined. And as some of our Courts have no other limitation than from the Spring term to the Fall riding, or *vice versa*, these must necessarily be kept open for months to await the deliberations of a jury in such a case. We are satisfied that the law does not impose such a duty upon the Judge.

From the condition of the record, we would infer, if necessary, that although the petitioner's case was submitted to the jury on Friday, and they were discharged on that day, yet a reasonable time was afforded them for deliberation before the adjournment of the Court. The affirmation upon the record that such was the fact need not have been made, it is enough that the reverse is not shown. The case of Burns v. The State is unlike the present. There the prosecutor was taxed with the costs by the Circuit Court, without assigning a cause for such an order, and it was here held that as the statute only conferred the power to tax the prosecutor with costs, where

the prosecution appeared to the Court to be frivolous or malicious, an order for that purpose should affirm that such was the fact.

In the State v. Hughs, 2 Ala. Rep. 102, we determined that the verdict of guilty in a case capitally punished could not, if adverse to the prisoner be received in his absence, but if it was, he should not be discharged, but might be tried *de novo*. This case is one of a lower grade of offence, yet we apprehend, that if a party in a case like the present, submit his case to a jury and escape, that the Court are not bound to receive their verdict in his absence. It cannot be intended that the jury had agreed to acquit the petitioner, but if any presumption was indulged, it should be adverse to him, as he sought safety in flight. Be this as it may, as the petitioner was not forthcoming to abide the judgment of the Court, it is entirely proper to order a mistrial. The discharge of the jury, had the effect to vacate their finding, and an order to "erase" it, was an act of supererogation, which did not prejudice the petitioner, and he can consequently derive no benefit from it.

The consequence is, that the prayer of the petitioner is denied, without stopping to inquire whether if the grounds stated in the petition were well founded, the remedy by *mandamus* would be proper.

ELMES v. SUTHERLAND.

1. A voluntary conveyance by a debtor to a trustee of lands and personal property for the purpose of securing the payment of debts, some of which are past due, and others are running to maturity—fixing a distant day after the maturity of the youngest debt—and providing that until then the debtor shall continue in the possession and use of the property, applying the profits to the payment of the debts, is not materially different from a mortgage executed under the same state of facts; and when it does not appear by the deed that the debtor is in failing circumstances, the stipulation that he may remain in possession and use of the property, does not *per se* make the deed void.

2. Neither is such a conveyance void *per se* from the circumstance that perishable articles are conveyed by it with a reservation of a use to the debtor until the time fixed by the deed as the law day. Such a stipulation is good between the parties, though it is possible it may have no effect against an attaching creditor.
3. Such a deed however is invalid to pass the title to the trustee until it is assented to by the creditors whose debts are intended to be secured by it. Until such assent, the deed operates only as the conveyance of a power which is revocable by the debtor; and the same effect is produced by the levy of an execution.
4. It is questionable whether this Court can entertain jurisdiction when the final decree is *pro forma* by the consent of the parties; but when the argreement is that such a decree shall be rendered, but none in point of fact is given, the writ of error will be dismissed.

Writ of error to the Court of Chancery for the 26th District of the Middle Division.

The case made by the bill is substantially this:

On the 14th of April, 1842, Wiley J. Sorell, executed a deed of trust which on its face appears as an indenture *tri-parte.* Sorell of the first part, Sutherland, the complainant, of the second part, and James M. Sorell and Henry Adams, executors of the estate of John Sorell, deceased, John Sorell, James M. Sorell, James Pylant, Person Davis, and Larkin Barnett of the third part. It recites, that the party of the first part is indebted severally to the parties of the third part in various sums of money, some of which appear from the instruments of indebtedness described in the deed to have been past due at the date of the deed, and others then running to maturity; but all of the debts falling due at periods between the date of the deed and the 27th March, 1843; and that the party of the first part is willing and desirous to secure them. The deed then proceeds to convey to the party of the second part in consideration of what is recited, and for the further consideration of one dollar, certain lands, slaves and other personal estate, "upon trust nevertheless, that the said Sutherland, his heirs, &c., shall permit the said Wiley J. Sorell to remain in quiet and peaceable possession of the property conveyed, and apply the profits thereof to the payment of the debts before described, (except the profits of the present year's crop, which is hereby set apart for the payment and discharge of a certain judgment in favor of Griggs & Elliott, obtained in the County Court of Dallas county, at the August term, 1841,) until the

first day of April, 1845, which is the time hereby set for the payment of the debts, notes, and several sums of money hereinbefore described and hereby secured, or intended to be secured. And upon the further trust, that the said Sutherland, his heirs, &c., shall, or will, as soon after the happening of such default of payment, if any default shall be made, on the sums aforesaid, as he, his heirs, &c., shall think proper; or the said parties of the third part, or any or either of them, or their executors, &c. shall request, sell the said lands, slaves and personal property before conveyed, or such part thereof as the said trustee or his representative hereby authorized to act, shall think sufficient for the purpose and proper, to the highest bidder for ready money, at public auction, in the town of Centreville, after having given ninety days notice thereof in one or more newspapers printed in Tuscaloosa, and also notified the same by advertisements set up at the court house of Bibb county for sixty days previous to the day of sale; and out of the money derived from such sale, after defraying the expenses thereof and all the expenses attending the premises, pay to the said persons hereby secured, or intended to be secured, their heirs, &c., with the interest which may thereon have lawfully accrued, and the balance, if any, shall pay to the said Wiley J. Sorell, his heirs, &c. But if the whole of said sums heretofore described shall be fully paid off and discharged, to the said persons, their heirs, &c., on or before the first day of April, 1845, when the same is hereby made payable, so that no default of payment be made, then this indenture to be void, or else to remain in full force and virtue." This deed is signed by Sorell, the grantor, and by Sutherland the trustee, and not by any one of the parties of the third part. It was proved and admitted to record on the 4th May, 1842.

Elmes, the defendant, obtained a judgment against Sorell, on the 22d April, 1842, and having sued out execution had the same levied on all the lands and six of the slaves conveyed by the deed. This levy was made in November, 1842, the said Sorell being then in possession.

The bill asserts, that the deed was executed honestly and fairly, and that the property thereby conveyed will not probably produce more than the debts intended to be secured, after satisfying an outstanding mortgage to one Stoutenborough, which

is a prior lien on the lands conveyed by the deed. It also asserts, that if the property levied on is sold under the execution, the trustee may be greatly prejudiced and injured.

The prayer is for an injunction, and that the interest of Sorell and the *cestui que trust* under the deed may be separated, and that of the former only subjected to sale.

The bill is filed by Sutherland as complainant, and Elmes is the only party made defendant.

He appeared and moved to dismiss the bill for want of equity. The Chancellor refused this motion, and it was then agreed by the parties, that a decree *pro forma* should be rendered for all that is alledged or prayed for by the bill, in order that the case might be taken to this Court for revision. Upon the motion to dismiss the bill no specific decree is rendered by the Court of Chancery, but the writ of error seems to be sued out upon the idea, that this agreement is to be considered as a decree.

It is now assigned as error that the Chancellor refused to dismiss the bill.

J. W. Pryor, for the plaintiff in error, made the following points:

1. The deed of trust is incomplete and has no legal efficiency until executed, or at least assented to in such a manner as to bind the third parties. [Townson v. Tickle, 3 B. & A. 31; Garrard v. Lord Lauderdale, 3 Simmons 1; Manton v. Coburn, 17 Mass. 454] It is true, in some cases, that the assent of the *cestui que trust* will be presumed, but that is so only when the deed is beneficial and unconditional. [Tompkins v. Wheeler, 16 Peter's, 106; Dale v. Bodman, 3 Metcalf, 139; Russell v. Woodward, 10 Pick. 408.]

If, however, the deed had been executed by the parties of the third part, or their assent to it was presumed or shown, it is notwithstanding, fraudulent and void as to other creditors:

1st—On account of the existence of the judgment in favor of Grigg & Elliott.

2d—Because a part of the property thus attempted to be placed beyond the reach of the law was perishable, and must necessarily have been injured or consumed before the expiration of the time of forfeiture. The hogs, carriage, cattle, household and kitchen furniture are of this nature. [Wiswall

v. Ticknor & Day, 6 Ala. Rep. 178; Robbins v. Parker, 3 Metcalf; Byrd v. Bradley, 2 B. Mon. 239; Am. Law Mag. No. 5, 186.]

3d—The reservation of the possession to the grantor for such a length of time, is conclusive evidence of fraud. [Harris v. Sumner, 2 Pick. 129.]

3. If the deed on its face is good, the bill is notwithstanding, entirely defective, as it should have averred, the debts attempted to be secured were actually owing from the grantor. The recitals in the deed neither establish the fact nor dispense with the necessity for the averment. [McCann v. Wood, 4 Ala. Rep. 258; Bank at Decatur v. Kenney, 5 Ala. Rep.; Smith v. Acker, 23 Wend. 653; Hamford v. Artcher, 4 Hill, 271, 295; Russell v. Woodward, 10 Pick. 408; Rodgers v. Hall, 5 Watts, 106; Blan v. Maynard, 2 Leigh. 29.] The allegation that the deed was made *bona fide*, cannot prevail against the fraudulent intent. [Grover v. Wakeman, 11 Wend. 187.]

The bill also ought to alledge, that the property conveyed was not reasonably worth more than sufficient to secure the debts provided for. [Borden v. Sumner, 4 Pick. 265; Straper v. Eckhart, 2 Whart. 302.]

4. The complainant had a complete and adequate remedy at law.

No argument was submitted on the part of the defendant in error.

GOLDTHWAITE, J.—1. In the consideration of this case, it is important to bear in mind that, although the assignment upon its face appears to be the mere voluntary act of the debtor and without any immediate consideration passing from the creditors named in it, yet there is nothing to show that the debtor at that time was in failing circumstances. In the first aspect, it differs from a mortgage executed concurrently with the creation or extension of a debt, and in the last, from an assignment by an insolvent debtor, in contemplation of his insolvency. This distinction between this case and that of an assignment by an insolvent debtor, in view of his insolvency, renders it unnecessary to consider what effect the actual or contemplated insolvency of the debtor would have upon this deed; because divested of this circumstance, the deed of trust

is not materially different from a mortgage executed under the same state of facts. We may then examine the case as if it was a mortgage executed by the debtor subsequently to the creation of his debt, but without any actual agreement with, or assent of all or any of the preferred creditors. The first question then is, as to the validity of the deed in consequence of its containing a stipulation that the debtor shall remain in possession of the property, to use it for his own advantage, but to apply the profits to the extinguishment of the named debts.

It seems to us that this stipulation by a solvent debtor amounts to nothing more than is found in every mortgage. The debtor clearly has the right until the law day to remain in possession, with the perception of the profits to his own use, and until the law day has passed his possession is neither fraudulent *per se*, nor evidence of fraud. Repeated decisions of this Court have settled however, that such a stipulation has not the effect to prevent any other creditor from making a levy upon the interest remaining with the mortgagor. It is therefore clear that this stipulation, in the manner in which the case is presented, does not make the deed void.

2. The next question upon the deed itself, is, whether the reservation of a use in the perishable articles, such as the carriage and harness, wagon, cart, farming tools, household and kitchen furniture, cattle and hogs, is sufficient to disclose a fraudulent intention as to other creditors, and consequently to avoid the deed? This is more difficult of solution than the other, but we can perceive no reason why a mortgage by a debtor not in failing circumstances, and intended merely as a security, should be absolutely void by the reservation of such a use. The case of Robbins v. Parker, 3 Metcalf, goes only to the extent of declaring the mortgage void as to the particular perishable article. Considered as a mere security, and between the parties themselves, there is no just reason why a creditor may not be allowed to take a mortgage upon a perishable article, and yet permit the debtor to remain in the possession and use of it until the law day. It is possible that the reservation of such a use might have the effect to render the particular perishable article subject to levy and sale at the suit of another creditor, though as to this we express no opinion.

It is very obvious too, that the reservation of such a use by a debtor shown upon the face of the deed, or otherwise, to be in failing circumstances, might receive a very different construction. We are therefore of the opinion, that the reservation in this deed is not *per se* fraudulent, so as to avoid the deed.

These are the only objections urged against the deed, as being apparent upon its face, and neither of them are sufficient to warrant a Court in declaring it void.

3. The remaining question is one quite novel in this Court. The defendant to the bill insists there is no equity in it, for the reason, that the creditors named as the third parties to the deed have never executed it; and it is not shown they ever have assented to its provisions, by binding themselves not to sue the debtor until after the expiration of the time fixed as the law day in it. This involves an inquiry, whether such execution or assent is necessary? It has been decided that the assent of creditors will be presumed when the assignment is for their benefit. [Brooks v. Manbury, 11 Wheat. 78; Tompkins v. Wheeler, 16 Peter's, 139.] But, conceding this as the general rule, it is insisted that this presumption only arises when the deed is absolute and unconditional; and that it is repelled whenever the conditions imposed are otherwise, or an obligation is cast on the creditor to do or omit any thing whatever. It is very evident that the debtor never intended the deed should be valid, unless the time of payment of all the debts was extended by the creditors to the first April, 1845. In order then for the deed to have any effect it was necessary, in our judgment, that all the creditors named in it should have signified their acceptance of the conditions imposed by it. We say *all* the creditors, because the deed contains no stipulation that less than all should receive any benefit from it, and it is apparent that no benefit would result to the debtor if it was refused by any of them. The cases are numerous to show that deeds of this nature are of no validity until assented to by the intended beneficiaries. [Story Eq. 236, § 972, and cases there cited. See also Russell v. Woodward, 10 Pick. 408; Dale v. Bodman, 3 Metcalf, 139.] Until then, the deed is considered as conveying a power only to the trustees which is revocable by the debtor. If revocable by the debtor previous to assent being given by the creditors, it follows, that the levy of an exe-

cution produces the same consequence. As the complainant's title to the property levied on as against the execution creditor, depends upon the assent of the creditors named in the deed, this should have been shown affirmatively by the allegations of the bill. Without such allegations the bill is fatally defective, and ought to have been dismissed as containing no equity.

4. If in point of fact a decree had been rendered by the Chancellor for the relief prayed by the bill, in accordance with the agreement of the parties, it would present a question worthy of grave consideration, how far this Court could take cognizance of the cause under such circumstances, as it only has appellate and not original jurisdiction. It is quite possible that we might feel constrained to repudiate a case, where the parties had consented to a *pro forma* decree. It does not appear however, that there is any final decree in the case, and the consequence is, that the writ of error must be dismissed.

BORLAND v. WALKER AND OTHERS.

1. It is no objection to a deposition that the interrogatories are prolix, multifarious, and double, but if the record is thereby unnecessarily incumbered, the offending party may be taxed with the costs thereby unnecessarily incurred.
2. An objection to an entire interrogatory, when part of it was proper, should be overruled.
3. When one in an insolvent condition, with judgments then in force against him, and others about to be obtained, sells to his father-in-law his entire estate, not reserving his household furniture—providing by the contract for the payment of only a portion of his debts, and giving a credit for the residue of the purchase money, the first payment of which was to fall due in seven and the last in about twelve years—as its necessary tendency is to hinder, and delay creditors, the law will presume such to have been the intention of the parties, unless the suspicious appearances are satisfactorily explained, and the contract shown to be *bona fide*.

4. If in such a case the vendee long before the payments are due by his contract with the vendor, commences paying the unsecured creditors of the latter, they giving indulgence, it is evidence that the contract was not real, and that there was a secret trust between the parties.
5. The retention of possession after an absolute sale of personal property, is evidence of fraud, though open to explanation, but is not sufficiently explained by proving a secret agreement between the vendor and vendee, that the latter should continue to control the property as the overseer of the former.
6. Where one charged as a *particeps fraudis*, is examined as a witness to prove the contract fair, he can expect credence to be given to his statements only by making a full and frank disclosure of all the facts. If he answer generally, or evasively, the Court will be authorized to infer that the imputation against him is well founded.
7. When a contract is void for fraud, it is void *ab initio*, and will not be allowed to stand as security to the grantee for advances he may have made, or responsibilities he may have incurred.

Error to the Chancery Court of Lowndes County.

The bill was filed by the plaintiff in error, and charges that in September, 1840, by an agreement in writing, the defendant Walker, sold to the complainant his estate, real and personal, consisting of lands and slaves, household furniture, and other articles of property for the sum of thirty-seven thousand dollars. Out of this sum the complainant agreed to pay a debt due the Bank at Montgomery, by Walker, amounting to about fifteen thousand dollars—to one Robinson, five hundred—the like sum to Cloughton & King—and to Bull & Files, three thousand dollars, which was to be paid out of the growing crop.

After these payments were made, the residue of the purchase money was to be paid to Walker, in six annual instalments—the first of which was to be paid in March, 1847, and the last in March, 1852—the five first being for $2,200, each, and the last for $2,000.

That since the making of the above agreement, the marshal and sheriff have taken and sold ten of the negroes, under executions issued on judgments obtained against Walker, of the existence of which he had no knowledge, and which Walker concealed from him at the time of the purchase. That other judgments have been obtained against Walker, on which executions have issued, and been levied on other of the slaves so sold, and on some of which he has been garnisheed as a debtor of Walker. It is also alledged that the complainant has

paid all the debts which by the agreement he was bound to pay, and in addition has paid many others, which are set forth in the exhibit. That complainant was deceived by Walker, who induced him to believe that all or nearly all his debts were enumerated in the agreement—that he acted in good faith, and that his purchase has been beneficial to the creditors, by saving the property from sacrifice.

Walker and the execution creditors are made defendants. The prayer of the bill is for an injunction to the creditors proceeding at law, and for relief in the alternative, viz: That the unsatisfied creditors of Walker be decreed to elect either to reimburse to the complainant the moneys paid by him, and that the sale be rescinded and the property be declared subject to their demand and sold, or that the complainant be subrogated to the rights of those creditors, whose debts he has paid, and have the same *lien* on the property, to which they were entitled, and that the property be sold to satisfy the same; or that the creditors be decreed to wait for the payment of their debts until the instalments on the purchase fall due, to be paid into Court, and distributed among the creditors as the Court may direct.

Appended to the bill as an exhibit, is the agreement described in the bill, signed by complainant and Walker, in substance as described in the bill. After the signature is a memorandum to the following effect: "P. S. And another note payable on the 1st of March, 1852, for two thousand dollars; this 27th day of Sept. 1840."

The creditors answer, and deny the validity of the sale—insisting that it was made with the intent to delay, hinder, and defraud creditors—that there has been no real change of the possession of the property, since the pretended sale, and that it is fraudulent and void.

Walker in his answer, in effect, admits the material allegations of the bill. Much testimony was taken on both sides which need not here be set out, as it is recited in the opinion of the Court.

The cause coming on to be heard, objections were taken by both parties to the testimony adduced by each. The decision of the Chancellor upon such points as can be here reviewed, will alone be stated.

The complainant objected to the defendant's testimony on the ground that the interrogatories were prolix, double, multifarious, and incapable of being crossed. The Chancellor overruled the objection, because too general, and because it did not specify and point out the objectionable matter.

The complainant also objected to the 12th interrogatory for irrelevancy, which was overruled.

The defendants (except Walker) objected to the testimony of Walker, which had been taken in the cause. The Chancellor considered that Walker had a direct interest in the litigation, was a proper party defendant, but that being interested, he could not be examined as a witness—the more especially as he was concerned in a transaction impeached for fraud. And further, that the fact that he was a certificated bankrupt, did not restore his competency—he accordingly suppressed his testimony. And after an examination of the evidence, considering it as establishing the defence, and that the contract was fraudulent in point of fact, dismissed the bill.

These matters are now assigned as error.

Williams, for plaintiff in error—cited 1 Vernon, 465; 2 Id. 678; 2 P. Wm's, 203; 2 Vesey, Jr. 516; 1 Johns. Chan. 478.

R. Saffold, contra. The testimony of Walker was properly suppressed, because he had an interest in the result. [2 Paige, 24, 54; 1 Hop. 488; 1 Hoff. C. P. 485, rule 73.] By making a material defendant a witness complainant forfeits all right to a decree. [1 Cox Cases, 344; 9 Mod. 438; 1 Beatty's Rep. 356.]

The bill is multifarious and is neither a creditor's bill or a bill of peace. [2 Story's Eq. 147, 151–3; 1 Atk. 282; 2 Id. 391, 483.]

The entire transaction is fraudulent as shown by the contract and the testimony. [4 Ala. Rep. 374; 14 Johns. 458; 4 Id. 536; 8th Dana, 263; 4 Days, 146; 13 Pet. 101; 2 Id. 107; 2 Ala. Rep. 313; 3 Stewart, 243; 20 Johns. 442; 1 Hop. 373; 2 Mason C. C. R. 252; 11 Wend. 187; 4 Paige, 23; 9 Porter, 566; 16 Wend. 523; 17 Id. 53; 7 Paige, 163; 20 Wend. 507; 9th Johns. 337; 7th Cowen, 732; 5 S. & R. 275; 2 Kent's Com. 412; 6 Rand. 285; 2 Stewart 50, 336; 3 Ala. Rep. 444; 5 Id. 531.]

ORMOND, J.—There are some questions presented on the record arising on preliminary points, decided by the Chancellor against the plaintiff in error, which it is proper should be first considered. The complainant objected to the depositions of the defendants upon the ground, that the interrogatories were prolix, double, multifarious, and incapable of being crossed. The Chancellor overruled the objection on the ground, that it was not sufficiently specific. It is not easy to perceive how the objection for prolixity could have been otherwise stated, but we apprehend that it is no objection to a deposition, that the interrogatories were prolix, though if the record was thereby unreasonably incumbered, the offending party might be taxed with the costs thereby unnecessarily incurred. The same remarks apply to their being multifarious and double, which, if it does not mean the same thing, must mean that irrelevant matter was introduced. If such were the fact, it would not vitiate the answers to such parts of the interrogatories as were relevant, and the objections to the entire depositions for this cause were therefore properly overruled. The objection, that cross interrogatories could not have been framed upon the interrogatories, we think has no foundation in fact.

The 12th interrogatory was objected to for irrelevancy. It consists of an inquiry, whether Walker was not reputed and believed to be insolvent in his neighborhood, or greatly embarrassed, at the time of making the contract. Whether Borland was not seriously in debt at the time; more than his income would pay for several years—and whether at the time the contract was made, it was not ascertained that a very short crop would be lmade.

Conceding that evidence of the embarrassment of Walker unless known to Borland, would have been irrelevant, it is clear that the residue of the interrogatory was pertinent. The embarrassed condition of Borland would tend to establish the fraud by showing his inability to make such a purchase, and the prospect of the failure of the crop by diminishing his means have the same effect. What weight the evidence would be entitled to we need not now consider. The objection being to the entire interrogatory was properly overruled. It is proper however, to say, that the answers to the first part of

the interrogatory do not appear to have influenced the opinion of the Chancellor, and have not been considered by us.

The question which arises upon the rejection of the evidence of Walker, the grantor, is one of more difficulty. The rule of Chancery practice is clear, that a defendant may be examined touching any matter in litigation in which he has no interest. One object of the bill was, to obtain a rescission of the contract. To the bill, in this aspect, he was a necessary party, having a direct interest in the event. The bill further prays, that the complainant may be subrogated to the rights of those creditors of Walker whose debts he has paid. As between the complainant and the creditors the interest of Walker was balanced, as has always been held in this State, in the analogous case of trials of right of property where the contest is between the creditors and the beneficiary claiming under the deed made by the debtor, and this, although the deed may be impeached for fraud. We shall therefore, for the present, decline the decision of this question, because in addition to the reasons already adduced, the testimony of Walker, the vendor, does not in our opinion vary the result.

The contract which we are now to consider was before this Court in the case of the P. & M. Bank v. Borland, 5 Ala. Rep. 531, and we there held, that the contract on its face was not fraudulent. It was then considered without reference to any extrinsic facts, but the question is entirely different when presented in connection with the facts now disclosed. The case now presented is that of a man in an insolvent condition, with judgments in force against him and others impending over him, selling his entire estate, not reserving even his household furniture, to his father-in-law; providing for the payment of a portion only of his creditors, and giving a credit for the residue of the purchase money, payable in instalments, the first of which was not to fall due for near seven years, and the last postponed for near twelve years. This has very much the appearance of a design to hinder and delay creditors; it is manifest that it has that effect. Where such a contract is made between a father-in-law and son-in-law, those suspicious appearances acquire increased strength, and demand a full and satisfactory explanation, showing that the transaction is *bona fide*. Aware

of this, the allegations of the bill are designed to obviate these objections, and to show the fairness of the transaction.

The bill charges that Walker, the vendor, deceived the complainant at the time the contract was made, by concealing from him the amount of his debts. The allegation is as follows:

"He further represents, that if he had known that said Walker was indebted to the extent that he has since ascertained, he would never have entered into said contract; and that if he had known of the judgments existing against Walker besides those in favor of said Bank, he likewise would have refused to make said purchase. But he believed that the judgments in favor of the Bank were all the judgments against him, and that the enumeration of debts in exhibit A. comprised all, or nearly all of the debts of the said Walker; and that he was satisfied that all and every of the debts of the said Walker did not amount to more than the amount of the purchase money aforesaid. He further believed that he could settle with the creditors of Walker without suit or expense to himself, and without loss or injury to them; and he avers that he has done so to the satisfaction of said creditors to the amount before mentioned."

These important allegations are very unsatisfactory and incongruous. In the first branch of the sentence it is stated that complainant supposed, and believed, that the debts of Walker enumerated in the contract, and which complainant undertook to pay, (amounting to about $20,000,) were all, or nearly all, the debts Walker owed, and that acting on this belief he made the purchase. In the succeeding part of the sentence, it appears, that he there supposed it probable that it might consume all the purchase money to discharge the debts of Walker. When it is considered that by the contract no part of the large residue was to be paid until March, 1847, and the last instalment not until March, 1852, it will be at one perceived that the creditors of Walker, not provided for in the contract, would be wholly in the power of the complainant. The complainant in making this allegation is doubtless stating it as strongly as possible in his own favor, yet it can be understood in no other light, than that he expected the creditors not provided for, should be paid out of the residue, and that they

would consume it. They were then, some of them, to wait near twelve years for their debts, and none could obtain payment for near seven years; yet he says, he expected "he could settle with the creditors (not provided for) without suit, or expense to himself, and without loss or injury to them."

But why, it may be asked, did he expect to have any thing to do with the creditors of Walker? If the contract was *bona fide* the large residue was to be paid to Walker, and the expectation here admitted to exist when the contract was made, that the money was not to be paid to Walker, but was to go to the creditors of Walker in payment of their debts, is, if not an admission, quite an intelligible intimation, that complainant was to make terms with the creditors for the payment of their debts.

Accordingly we find that the complainant, since the purchase, although the first instalment is not yet due, has made arrangements for the payment of a large amount of the debts of Walker, which he was under no obligation whatever to pay, unless there was a secret trust that he should do so, amounting in all, as alledged, to upwards of nine thousand dollars. One of the debts thus paid may suffice as an example.

Walker was indebted to Greenwood & Rochelle by note, which was put in suit in August, 1840, a short time before the contract was made between Walker and complainant. Having obtained judgment, and being unable to make the money on their execution, one of the firm called on Walker to know what arrangement he had made for the payment of the debt. Walker informed him that he had sold out for the purpose of paying his debts, having discovered that his property, if sold under the hammer, would not pay them, and that he would make an arrangement through Borland for the payment of the money. The arrangement was made by taking Borland's notes due 1st January, 1842 and 1843, for the amount of the judgment, and including a debt which had become due since the date of the contract between Borland and Walker. These notes were not paid at maturity, but put in suit, and upon one the money had not been paid when the evidence was taken.

Here we see distinctly the consummation of the scheme, which evidently was, by the postponement of the payments to a distant period, to coerce the creditors into arrangements for

the payment of their debts at a future time; and thus while the property was placed beyond the grasp of the creditor, to compel him to wait until by the receipt of the crop his debts could be paid. If the transactions were real, can it be believed that the complainant would have anticipated the payment of a large portion of the purchase money eight or ten years? Such is not the conduct of men in the ordinary transactions of life, and the departure in this instance can only be explained upon the hypothesis, that the sale was not real, and that there was a secret trust between the parties.

The conduct of the parties to this transaction at the time it was entered into, and subsequently, in addition to what has been stated, demonstrates the correctness of this conclusion.

The instrument by which it is evidenced, when considered in connection with the facts, is of a suspicious character, not only from the unusually long credits given for the purchase money, but also because a portion of the purchase money was not provided to be paid at any particular time; nor do any notes appear to have been executed. The sale is not attended with the usual consequences attending real transactions of that magnitude. No notoriety whatever appears to have been given to it. No change takes place in the government or conduct of the plantation—the same slaves continue to cultivate the same land, although the complainant has a plantation in the immediate vicinity. The vendor appears to the world, still to be the owner; he lives in the same house—his family ride in the same carriage—they are waited on by the same servants—and he appears to the neighbors to be exercising the same acts of ownership over the place as before the sale, and still appearing to derive his support from the plantation as the proprietor. The conveyance is of all the property, real and personal, household furniture, &c.

To repel the presumption which the law makes in such a case, the complainant proves that he employed and paid two overseers for a short time; that he employed and paid a physician for attending to the slaves; and to account for the interference by Walker, and control exercised by him over the property, after the sale, proves by Walker himself that he employed and paid him as overseer. No reason whatever is given for permitting Walker after the sale to retain possession

of the household servants, carriage, furniture, &c. except that they were left for the use of the family, and that in 1842, they were conveyed by deed in trust for the benefit of Mrs. Walker and the family.

Since the decision in the case of Hobbs v. Bibb, 2 Stewart, 54, it has been the settled law of this Court, that where there is no change in the possession, after an absolute sale of personal property, it is evidence of fraud, unless satisfactorily explained, and shown to be *bona fide*. What will be sufficient evidence to explain the apparent discrepancy of the possession not accompanying the title, cannot be reduced to any fixed rule. It must however be such, as to demonstrate to the Court or jury trying the fact, that notwithstanding possession has not accompanied the transfer of the title, the sale was really made, and the title transferred.

In our opinion the facts relied on by the complainant to repel the presumption of fraud are not sufficient, especially in a case where from the intimate relation between the parties, a secret trust might be presumed more easily than between strangers. As it respects the house servants, carriage, &c. no reason whatever is given, but that they were left for the use of the vendor. Nor do we consider that the proof of ownership exercised by the complainant over the plantation and slaves, shows any thing more than a colorable possession. There does not appear to have been any actual, real, change of the possession. If the secret agreement between the vendor, and vendee, that the latter should continue to control the property as the *overseer* of the former, was sufficient evidence of change of possession, there would be no security whatever left for creditors.

The testimony of Walker, the vendor, does not vary the result we have attained. He is charged as a *particeps fraudis*, and although competent to testify, is certainly a suspicious witness. He admits his embarrassed condition when the contract was made, and that he has since become a bankrupt—that the sale was made to enable him to pay his debts—that the long time was given that the property might bring the best price possible. Admits that the debts paid by complainant for him not provided for in the contract, were paid at his request. In answer to a searching cross interrogatory, whether he

did not derive his support from the plantation as before the sale, and if not, to state how he obtained his support—he says, that he does not derive his support from the plantation *as formerly*—and that he "supports his family in an honest way." A witness placed in the condition of this, can expect credence to be given to his statements only upon his making a full and frank disclosure of all the facts of the case. The creditors alledged that the sale was fraudulent—that he still derived his support and that of his family, from the plantation and slaves, which he pretended to have sold. In the condition in which he had placed himself, they had a right to know what were his resources, and it was his duty to disclose them. By omitting to do so, and by answering generally, and evasively, this Court must come to the conclusion that the imputation is well founded.

The declarations of the complainant to different persons after the purchase, shed a strong light upon the transaction, and demonstrate its true character. To the witness Lowe, he declared, that at the time he purchased the property he thought he could by putting his own force with it, pay off the debt, and save the property, but that he would now give any one five thousand dollars that would take it off his hands. To Kelly, that he had purchased the property to try to save it—that if the creditors of Walker, should sue him they would tear him all to pieces, but he thought he could pay the debts by getting indulgence. Several of the witnesses prove, that he admitted that he had obtained time by giving his own notes in the place of Walker's; and others, that he bought the property to try to save it for his daughter.

These declarations are utterly inconsistent with the idea of a *bona fide* purchase of the property; but entirely agree with the supposition that it was an attempt to shelter the property from legal coercion, and thereby to gain time for the payment of the debts from the avails of the plantation.

Nor do we think it possible to doubt, that the complainant knew at the time of the purchase, that Walker was greatly embarrassed, beyond the debts enumerated in the schedule, if not insolvent. As already stated, the bill concedes in not very equivocal terms such knowledge—the declarations of the complainant to Lowe and others, in distinct terms admits it; and

the relationship of the parties, and the residence on adjoining plantations, renders it to the last degree improbable, that the complainant should have no intimation, of what every one else in the community knew.

We have thus attained the conclusion that this contract was made with the intent to hinder and delay creditors, and it is therefore fraudulent and void. It is however insisted, that the complainant is entitled to a *lien* on the property, to the amount of the debts of Walker paid by him.

The contract being void for fraud, no right which can be enforced in Chancery can grow out of it. If this pretension were allowed, there would be no risk whatever in making such contracts as this, as the fraudulent actor would at all events receive a credit for what he had paid out. The established rule of the Court of Chancery, is, that where a deed is void for fraud, it is void *ab initio*, and will not be allowed to stand as a security to the grantee for advances he may have made, or responsibilities he may have incurred. [Sands v. Codwise, 4 Johns. 536; Bean v. Smith, 2 Mason 252.]

The case of Cummings & Cooper v. McCullough, 5 Ala. Rep. 324, relied upon by the counsel for the plaintiff in error, is entirely dissimilar. There, although a deed of assignment was declared void for fraud, the trustee was allowed a credit for all payments which he had made to the creditors of the grantor, before the filing of the bill, from the avails of the *choses in action* of the grantor, expressly upon the ground that the other creditors were not prejudiced thereby, as the trustee had merely done, what the debtor himself could have done, if the deed had never been made. That although the deed was void as to creditors, it was an authority from the grantor to the trustee to pay the debts; and so far as they were paid by the trustee, before the bill was filed, from the funds of the debtor, upon which the creditor had no *lien*, legal or equitable, he could not be prejudiced.

Not so in this case; the contract was the instrument by which the property has been kept from the grasp of the creditor. This being fraudulent, there was no right to receive the proceeds to the prejudice of any creditor, and it is therefore no answer to the defendants to this bill that other creditors have been paid from the produce of the estate—that, if it be

true, will not discharge their debt, which but for this contract, might long since have been paid.

It may be that the complainant and Walker did not suppose that by the contract they were making, they defrauded any one; or indeed that by placing the property beyond legal coercion for the space of twelve years, its product would during that period pay off all the debts, when, if forced into market at sheriff's sale, it would be insufficient for that purpose. However, this may affect the question in a moral point of view, it does not change its legal aspect. Such an interference with the right of the creditor, the statute of frauds pronounces fraudulent and void; and it can, we think, admit of no doubt, that the highest interests of this community are best supported, by a firm and energetic enforcement of its provisions.

Let the decree of the Chancellor be affirmed.

GIBSON, ET AL. v. GOLDTHWAITE.

1. A bill of interpleader will lie though the complainant be not actually sued, or be sued by one only of the conflicting claimants, or though the claim of one defendant be actionable at law, and the other in equity.
2. The complainant in a bill of interpleader, should make an affidavit that his bill is not filed in collusion with either of the defendants named therein, but merely of his own accord to obtain the relief sought; the want of such an affidavit may be good ground of demurrer, but if the defendants do not demur, they cannot object at the hearing, or on error, that the bill was irregularly exhibited.
3. Where one person *as the agent of another*, receives money which is claimed by a third person who gives notice of his claim, a bill of interpleader will not lie; for a mere agent cannot by notice by converted into a trustee: But it seems that a bill of interpleader, as between principal and agent was admissible, where the claim was under a derivative and not under an adverse title.
4. A bill of interpleader puts the defendants to contest their respective claims, and if the question between them is ripe for decision, the Court decides it; but if the cause is not in that condition, the Court directs an action, or an issue, or a reference to the master.

5. An attorney at law who has collected money, may file a bill of interpleader in respect to the same, against defendants who set up a derivative claim from the person for whom the attorney undertook the collection; and this, although he may be entitled to retain a part of it to compensate his services.
6. The defendants to a bill of interpleader will not be permitted to object on error, that a third person was not made a defendant also, where the want of such a party could not in any manner affect their rights.
7. In the absence of authority conferred by the charter, by-laws, &c., the president of the directory of a banking corporation, cannot use its cash or credits, &c., for the purpose of settling the demands of its creditors, &c.: And the seal of the corporation cannot impart validity to an unauthorized transfer by its president.
8. An assignment made under the resolution of the directory of a banking corporation, for a purpose within the scope of their powers is *prima facie* valid.
9. The deposition of a witness should not be excluded, merely because he has omitted to answer one of the questions propounded, which was *prima facie* impertinent, and the direct answer to which could not benefit the party by whom it was proposed.

Writ of error to the Court of Chancery sitting in Montgomery.

THE defendant in error filed his bill in June, 1841, setting forth that as an attorney and counsellor at law, residing in this State, he received of the "Tombigbee Rail Road Company," (a foreign corporation,) in the year 1838, a note and sundry other claims for collection, amounting to a very large sum of money—a part of which have been collected. That Felix F. Gibson exhibited to complainant a paper purporting to be an assignment of eleven thousand dollars of the nett proceeds of the claims in his hands, under the corporate seal of the company, and bearing date the 13th January, 1840. *Further*, that in June, 1840, the complainant received a letter from Charles Walsh, informing him that the corporation on the 24th February, 1840, made an assignment of its assets and effects of every kind to him, (Walsh,) for the benefit of its creditors: and in July or August, 1840, he was notified by Bryan Marsh, that Gibson had drawn an order in his favor, for about six thousand dollars of the sum collected on the claims in the complainant's hands. The complainant further stated, that Walsh informed him the assignment under which Gibson claims was fraudulent, and made by the president of the company without the authority or approbation of its directors: that he held the money collected by him ready to pay over to

the person entitled to it; that both Gibson and Walsh had instituted suits against him for its recovery; he therefore prayed that they and Marsh might interplead, &c., and in the meantime an injunction might issue to restrain trials at law, &c.

The defendant Walsh, in his answer states, that on the 24th of February, 1840, the president of the corporation, under the authority of a resolution adopted at a regular meeting of the board of directors, on the 13th of same month, did, by deed duly executed, assign to him all the assets, bills receivable, and property of every nature and kind of which the company was the owner, for the benefit of its creditors, &c. *Further*, at the time of this assignment, the company was the proprietor of the claims placed in the complainant's hands, or of the money thereon collected: that this defendant was the cashier of the company at that time, and when the assignment to Gibson bears date, and affirms, that the latter was made without the knowledge either of the directors or himself, that it was fraudulent and no consideration ever given therefor to the company. That Gibson was indebted to the company in the sum of thirty thousand dollars, which is still unpaid, and that its bills which were paid to the president, the defendant believes were retained by the latter and used for his own purposes, &c.

It is also stated, that the assignment to Gibson was a palpable violation of the by-laws which defines the president's powers, and so known to Gibson as he was a director at the time; that the circulation of the company was worth about forty cents in the dollar, yet the assignment contemplated that he should receive good funds for them at their nominal amount. *Lastly*, the defendant charges that the transfer was not made by the president to Gibson, until after the general assignment for the creditors, although it is dated previously.

The defendant Gibson answers, "that some time about the month of February, A. D. 1840," he was the *bona fide* holder of "about four thousand dollars" of the bills of the corporation, and as the agent of Bryan Marsh, held "about seven thousand dollars more of its circulation." That he made frequent application to the board of directors and officers of the company for their payment, which was from time to time refused; whereupon this defendant being desirous of securing the pay-

ment of the bills held by himself and Marsh, with the assent of the latter paid them over to the president of the corporation, to the amount of eleven thousand dollars, and received from him an assignment of certain claims then in the hands of the complainant, of which the company was the proprietor, "amounting to the sum of eleven thousand dollars," with interest on the same, at the rate of seven per cent. per annum. Shortly after the execution of the assignment, this defendant transmitted the same to the complainant who acknowledged its reception in writing. He denies that the assignment was made by the fraudulent combination of the president of the company and himself, and insists that the same was in accordance with a resolution of the board of directors, which authorized the cashier to deliver to him any bills receivable belonging to the corporation, in exchange for the bills which this defendant held. *Further*, he admits that he has commenced an action at law in his own name against the defendant for the money collected and withheld by him.

The defendant Marsh confirms the statements in the answer of Gibson so far as they relate to his interest, and declares his belief in the fairness and legality of the assignment to Gibson; inasmuch as he has been informed and believes that it was made in conformity to a general order of the board of directors of the company, authorizing its officers to give in exchange any of its assets for its circulation, at par; or if there was no such general or special order of the board, or by-laws, then it was made by the president in virtue of his general control of the affairs of the company. *Further*, that this defendant was not informed until November, 1840, that Walsh claimed the funds transferred by the assignment to Gibson; and he claims the portion assigned to him, not only under the transfer, but upon principles of equity applicable to his case.

The cause was heard on the bill, answers, exhibits, depositions and agreement of counsel. The Chancellor decided the following points: 1. He overruled the exceptions to the testimony, the first of which was, that the witnesses, Butterworth, Hatch and Gibson did not answer the seventh cross interrogatory; he being of opinion that this question was substantially answered by the answers to the direct interrogatories, as well

as the other cross interrogatories. The second exception was, that Butterworth's deposition was in his own hand writing, although he was the attorney for the defendant Walsh, and he had written in part the deposition of the witness Butler. 2. He was of opinion that the answer of Walsh, so far as it relates to the assignment to him, was fully sustained by the proofs. 3. That the president of the corporation had no authority, unless authorized by the charter, a by-law, or special grant of power to make the assignment to Gibson; that the evidence did not show an authority derived from either of these sources, or a confirmation of the act done. 4. That the assignment to Gibson being ante-dated, and made at a time when he was largely indebted to the company; which indebtedness is still unprovided for, warrants the inference that it was not *bona fide*. 5. That as no right to the funds in the complainant's hands, (even as against the company,) was transferred to Gibson, he could pass none to Marsh; and that the latter was affected by a notice to the former of the circumstances under which the assignment was made. It was therefore adjudged that the assignment to Gibson be set aside, and that the complainant pay over to Walsh the money collected by him on the claims, &c. &c.

E. W. Peck and L. Clark, for the plaintiff in error. The bill should have been dismissed, because it wants the affidavit of the complainant, that there is no collusion between him and any of the persons who claim the money in his hands. [Coop. on Eq. Pl. 49, 50; Mitf. Eq. Pl. 48–9; Story's Eq. Pl. 237; 2 Story's Eq. 116, § 809; 8 Paige's Rep. 345; 1 Cow. Rep. 704; 1 Smith's Prac. 473; Jeremy's Eq. Jur. 347.] So the bill is defective, because it does not show that the defendants claim the same debt, duty or other thing from the complainant. But on the contrary, Walsh claimed all the demands or money in the complainant's hands belonging to the corporation; Gibson, a part of them, and Marsh, a portion of the sum to Gibson. [Story's Eq. Pl. 237, § 291–3–4; 2 Story's Eq. 113, § 806; Coop. Eq. Pl. 45; 1 Cow. Rep. 703.]

The bill is objectionable in other respects. It does not alledge that the complainant was a mere stakeholder without interest, and the reverse is inferable, as he would be entitled

to a reasonable compensation for his professional services. [2 Sim. & Stuart's Rep. 347.] Neither of the assignees of the corporation could have sued at law in their own names, and the complainant being merely its private agent, cannot sustain a bill of interpleader. [1 Toml. Rep. 177; 1 Metc. & P. Dig. 245, § 41; 247, § 86–9; Story's Eq. 114, § 807; 2 Paige's Rep. 199; 1 Pick. Rep. 504; 15 Mass. Rep. 485; 4 Rand. Rep. —; 7 Conn. Rep. 399; 2 Greenl. Rep. 510; 5 Stew. & P. Rep. 60: 14 Mass. Rep. 107; 16 Id. 452; 2 Cranch Rep. 342; 3 A. K. Marsh. Rep. 384; 6 Pick. Rep. 322, 427; 1 Dev. Rep. 354.] A bill will lie, only where the complainant can in no other way protect himself from unjust litigation in which he has no interest. [2 Page's Rep. 201.]

The objections made to the testimony and decree at the hearing should have been entertained. And even if the bill presented a proper case for relief in equity, the decree is irregular in not adjudging that the parties should interplead; this being done, then, for the purpose of settling the conflicting claims of the defendants, the Chancellor should have directed either an action, an issue, or a reference to the master. [16 Ves. Rep. 203; 2 Paige's Rep. 570, 573.]

If the deed by which the president of a corporation transferred to Gibson some of its assets in the complainant's hands, is not good as a deed of assignment, it may be supported as an order to pay so much money when collected.

If all other objections to the decree of the Chancellor fail, it is then insisted that the corporation is a necessary and indispensable party.

N. Harris, for the defendants in error. The facts set forth in the bill make a proper case for an interpleader, and the bill was regularly exhibited for that purpose. [2 Story's Eq. 137, § 808; 142, § 814; 145, § 817; 133, § 806–7; 2 Paige's Rep. 570; 10 G. & Johns. Rep. 217; 13 Ves. Rep. 209; 16 Id. 203.] It is enough if a claim has been made, although no suit has been brought. [1 Smith's Pr. 473; 2 Story Eq. 137, § 808.] The want of an affiadavit denying collusion, was waived by answering the bill and claiming the fund. [Story's Eq. Pl. 237; Riley's Ch. Rep. 152; Hill's Ch. Rep. 583; Hawks. Rep. 359; Paine's Rep. 526; 2 Paige's Rep. 509; 3 Id. 505; 1 Sumner's

Rep. 579, 585; 2 Caine's cases, 40, 56; 2 Johns. Ch. Rep. 369; 4 Cow. Rep. 727.]

The objections to the testimony was rightly overruled. 1. It should have been made at the time the evidence was published. [2 Mad. Ch. 411; 1 Swanston's Rep. 171; 1 Smith's Pr. 394, 413; Clay's Dig. 614; rule 21, 616; rule 38.] 2. It is no objection that a part of the evidence is in the hand writing of Butterworth. [Minor's Rep. 136.] 3. The 7th interrogatory that was unanswered was impertinent, and an answer consequently would have been immaterial.

It was not necessary that the decree should have directed the parties to interplead. [1 Smith's Pr. 474; Clay's Digest, 614, rule 22.] And if important, the irregularity was waived by the defendants below proceeding to interplead. [5 Porter's Rep. 452; 2 Ala. Rep. 415.]

The assignment by Jones to Gibson, invested the latter with no right to any portion of the assets of the corporation in the hands of the complainant. [5 Wheat. Rep. 420.] There was no order of the board of directors authorizing it, and the president of the Bank does not by virtue of his office possess such a power. [2 Kent's Com. 299; A. & Ames on Corp. 242–3–5; Story on Agency, 108; 8 Wheat. Rep. 338–360; 6 Porter's Rep. 166.]

Again: the assignment to Gibson is void and does not bind the company. [2 Kent's Com. 292; 6 Porter's Rep. 160.] This is evidenced by these facts: 1. The directors were not informed that it was made. 2. It was ante-dated and made at Jones' residence instead of the banking house. 3. Gibson was indebted to the corporation at the time in the sum of forty thousand dollars, which is still unpaid.

If the assignment to Gibson was void, he acquired no transmissible interest, and Marsh acquired no right through him to the assets of the Bank in the complainant's hands. [3 Ala. Rep. 444; 4 Johns. Ch. Rep. 536; 14 Johns. Rep. 458; Story's Ag. 131; 1 Hall's Rep. 480.]

The rejection of the testimony objected to, would not affect the decree; for the testimony of the other witnesses is sufficient to sustain the decree. If all the evidence were excluded Marsh is not entitled to a decree; because he has not shown the assent of the directors to the assignment by Jones to Gibson.

COLLIER, C. J.—A bill of interpleader lies, where two or more persons severally claim the same thing under different titles, or in separate interests from another, who, not claiming any title, or interest therein himself, and not knowing to which of the claimants he ought of right to render the debt, or duty claimed, or to deliver the property in his custody, is either molested by an action or actions brought against him, or fears that he may suffer injury from the conflicting claims of the parties. The object of the application to a Court of equity is to protect the complainant, not only from being compelled to pay or deliver the thing claimed to both the claimants, but also from the vexation attending upon the suits, which are, or possibly may be instituted against him. [2 Story's Eq. 112–3; 1 Smith's Prac. 468; Mitf. 49; Atkinson v. Monks, 1 Cow. Rep. 703.] In the case last cited, the Court say that the appropriate allegations in every bill of interpleader are, 1. That two or more persons have preferred a claim against the complainant: 2. That they claim the same thing: 3. That the complainant has no beneficial interest in the thing claimed: and 4. That he cannot determine without hazard to himself, to which of the defendants the thing of right belongs. [See also Story's Eq. Plead. 237 to 241.]

It is sufficient that each of the defendants has a claim to the matter in question, although but one of them can maintain an action at law, the principle being to prevent a plaintiff from being twice vexed. And it is not necessary that he should have been actually sued. [1 Smith's Prac. 473.] In Richards v. Salter, 7 Johns. Ch. Rep. 447, it was said, that "The bill of interpleader is equally proper, though the party be not actually sued, or be sued by one only of the conflicting claimants, or though the claim of one defendant be actionable at law and the other in equity." To the same effect are Morgan, et al. v. Marsack and another, 2 Mer. Rep. 107; Angell v. Hadden, 15 Ves. Rep. 244. True, in Barclay v. Curtis, et al. 9 Price's Rep. 661, the Court of exchequer held, that a bill of interpleader could not be entertained where the claim of one of the defendants was founded on an equitable right; but this case is not supported by authority, and we think is indefensible upon principle. [See also Darden's adm'r, et al. v. Burn's adm'r. and another, 6 Ala. Rep.]

That the claimant of money or other thing may not be wrongfully delayed, the complainant in a bill of interpleader should make an affidavit, that his bill is not filed in collusion with either of the defendants named therein, but merely of his own accord to obtain the relief sought. [1 Smith's Prac. 474; Mitf. Plead. 49; 1 Cow. Rep. 704; 2 Story's Eq. 116; Story's Eq. Plead. 237.] The object of such an affidavit, it is said, is to prevent this proceeding from being resorted to for the purpose of giving an advantage to one claimant over the other; and if it is not annexed to the bill the want of "it is in strictness a good ground of demurrer." [Story's Eq. Plead. 238; 1 Cow. Rep. 704.] But if the defendants, without thus objecting that the complainant has not negatived collusion by his affidavit, submit to answer the bill, neither of them can at the hearing, or on error, object that it was irregularly exhibited. As the affidavit was intended for their benefit, and to prevent injury or inconvenience to the defendant who has the superior right, they may dispense with it, and their answers amount to an implied waiver. [See McElwaine v. Willis and others, 3 Paige's Rep. 505.]

In Cooper and another v. De Tastet and another, 1 Taml. Rep. 177, it was held, that where goods were deposited with a warehouseman as a *private agent*, he could not maintain a bill of interpleader. This decision is placed upon the ground that an agent must account to his principal, and whether the latter had the superior title or not, a delivery of the goods to him would discharge the former from liability to a third person. The settled rule both at law and in equity is, that an agent shall not be allowed to dispute the title of his principal to property, which he has received from, or for his principal; or to say, that he will hold it for the benefit of a stranger. [2 Story's Eq. 122.] So it has been held, that, where one person receives money for another, or his agent, and the money claimed by a third person, who gives notice of his claim, a bill of interpleader will not lie; for a mere agent to receive money for the use of another cannot by notice be converted into an implied trustee. His possession is the possession of his principal. [Id. 123.]

The true limit of the jurisdiction upon bills of interpleader, it is supposed is not settled by the authorities in a very pre-

cise manner. [2 Story's Eq. 120; Bowyer v. Pritchard, 11 Price's Rep. 115.]

In Lowe v. Richardson, 3 Madd. Rep. 277, it was doubted whether a bill of interpleader would lie at the suit of a master of a ship, where the adverse claims were *paramount* to the bill of lading; although it was conceded that it was maintainable, where the parties claim adversely at law or in equity *under* the bill of lading. But subsequently, the same Court, in Morley v. Thompson, 3 Madd. Rep. 564, decided that the master might file such a bill, although the adverse claims were *paramount* to the bill of lading. Mr. Justice Story remarks upon this decision, that the bill does not seem to have been founded upon any legal adverse titles, wholly independent of each other, and not derived from a common source. [2 Story's Eq. 121.]

In the cases of adverse independent titles, it is said, the true doctrine seems to be, that the party holding the property must defend himself as well as he can at law; and he is not entitled to the assistance of a Court of equity; for that would be to assume the right to try merely legal titles, upon a controversy between different parties, where there is no privity of contract betwen them and the third person, who calls for an interpleader. [2 Story's Eq. 124.] In Crawshay v. Thornton, 2 Mylne & Craig's Rep. 1 to 23, Lord Cottenham said, that a bill of interpleader, as between principal and agent, was admissible only where the claim was under a derivative, and not under an adverse title.

In respect to the mode of proceeding, an interpleading bill is considered as putting the defendants to contest their respective claims, just as a bill by an executor or trustee to obtain the direction of the Court upon the adverse claims of the different defendants. If therefore at the hearing, the question between the defendants is ripe for decision, the Court decides it; but if it is not ripe for decision it directs an action, or an issue, or a reference to the master. [1 Smith's Prac. 472; 2 Story's Eq. 125; Angell v. Hadden, 16 Ves. Rep. 202; City Bank v. Bangs, 2 Paige's Rep. 570.]

From this view of the law, it will sufficiently appear that the objections here taken to the bill and the mode of proceeding thereon are not maintainable. The bill alledges that all

the defendants have set up a claim to money collected by the complainant, on the notes and bills placed in his hands for collection by the "Tombigbee Rail Road Company;" and that two of the defendants have brought suits at law for its recovery: that two of the defendants claim the entire sum as assignees of the corporation, and the other defendant claims a part thereof under an order or transfer by one of the assignees: that the complainant has no interest in the sum collected by him (at least beyond his commission which it is competent for him to retain,) but holds the same for the use of the party entitled thereto: that he cannot determine without hazard to himself, which of the defendants is entitled to the money and thereupon offers to bring the same into Court.

We have seen, that to authorize the complainant to file his bill of interpleader it is not necessary that all the claimants should have sued him, or that they could have sued him at law in their own names. If it were necessary to have a legal right of action, which we by no means admit, two of the defendants might sue at law in the names of the corporation for their use, if the assignments under which they claim are operative against it; and this is certainly sufficient according to the authorities which lay down the most stringent rule on this point in favor of the defendants.

The argument that the complainant being an agent of the corporation merely, cannot call upon the defendants to interplead, cannot be supported. The authorities cited merely show that a private agent cannot question the title of his principal to money or property which he has received from, or for him, by bill of interpleader, where a third person sets up a claim to it. Here the complainant does not deny the right of the corporation, *his principal*, but merely states that two of the defendants claim as its assignees the money which he holds to its credit. The defendants do not set up a title independent of, and paramount to the principal; but merely derivative. They professedly deduce their title from the same common source, and are in such a predicament that they may with propriety be required to interplead and adjust their conflicting claims.

It was supposed that the Rail Road Company is an indispensable party to the bill, and that the failure to make the cor-

poration a party is fatal to the decree. The bill is exhibited upon the allegation that the company has no interest in the money in question, but has made a transfer of the same to one or two of the claimants. If this allegation be true, the corporation has no interest in the matter litigated by the defendants, or if it has, the decree as between the defendants cannot prejudice its rights as against the parties to this suit. But be this as it may, the defendants against whom the decree has been rendered, have not been prevented by the omission to make the corporation a party, from litigating the matters which affect them; and if the cause has been properly disposed of by the Chancellor, the decree will not be reversed at the instance of those who are not prejudiced by it; especially when the want of parties is now for the first time objected.

In respect to the form of the decree, the defendants had answered and taken testimony, the cause was ripe for a hearing, and it was competent for the Chancellor to have adjusted the rights of the parties without directing an action, issue, or reference to the master. This has already been shown to be the correct practice where a case of interpleader is brought to a hearing under such circumstances. Besides, in the present case, it is shown by the record, that the parties agreed that the depositions should determine to whom the money collected on the notes and bills placed in the complainant's hands should be paid.

The answer of Gibson admits the payment of the bills of the corporation by him to the *president* of the board of directors "sometime about the month of February, A. D. 1840," and the assignment by the latter to him of the moneys to be collected by the complainant for the company—denies all fraud, but does not alledge that the act of the president was authorized, either by the charter, a by-law, or special authority. Marsh asserts a right to seven thousand dollars of the moneys assigned to Gibson, declares his belief in the honesty of the transaction between the president and Gibson, and insists it was authorized by "a general order of the board of directors authorizing its officers to give in exchange, any of its assets at par."

It is not the appropriate office of the president of the directory of a banking corporation, to use its cash or credits for the pur-

pose of settling the demands of its creditors, and in the absence of an authority to transact such business, an assignment made of the property of the corporation, or an order given by him to pay its money to a third person, will not operate to divest the right of the corporation. This question arose in Hallowell and Augusta Bank v. Hamlin, et al. 17 Mass. Rep. 180, where it was held, that the president of the Bank had not *ex officio* the power to transfer its property or securities, and that his special authority to do it, must be shown by legal evidence. This conclusion is so clearly deducible both from general principles and adjudged cases as to require no argument to prove it. [See Ang. & A. on Cor. 242, to 245, and cases there cited.]

In the present case, neither the charter of the company, its by-laws, or the depositions in the cause, show the semblance of authority in the president to make the assignment to Gibson. The ninth section of the by-laws, which relates more particularly to the powers and duties of the President, and is the only evidence relating to them, which need be noticed, authorizes him to call meetings of the board, &c.; gives him a general superintendance over the officers and affairs of the Bank, &c.; requires him to sign all bills and notes issued by the Bank, recommend measures for its interest, and perform such functions and duties as properly belong to his office, as well as those which may properly be assigned him by the board: *Further*, he shall have power to affix the corporate seal "to all conveyances and other necessary instruments, and sign the same on behalf of the corporation, with the approbation of the board of directors." It is too clear for illustration, that this section does not authorize the president to assign the money or property of the company for the payment of its debts, or any other purpose.

The testimony in the record so far from showing that the assignment to Gibson was authorized or acquiesced in by the directory, proves the reverse. The president it seems did use the assets of the Bank (which were handed to him by its attorney, when the latter resigned,) for the purpose of paying its debts; but the claims which the complainant held for collection, were not a part of those which the attorney delivered up. Beyond this, it seems the president neither had or pretended to

have any control over the notes or other evidences of debt of which the Bank was the proprietor.

The president then, having no right to divest the corporation of the money collected by the complainant, either by a deed of assignment, or an order directing its payment, it follows, that the use of the corporate seal cannot impart validity to the transaction. And it is equally clear, that as the deed to Gibson was inoperative against the Bank, the order of Gibson to Marsh can have no efficacy. However honest and confiding the latter may have been, or ignorant of the facts of the case, he cannot be regarded as a *bona fide* purchaser without notice from a fraudulent grantee, and enjoy the rights accorded to one thus situated; for the reason that the assignor of Gibson could confer no right.

The assignment to Walsh as a trustee of the Bank was made under a resolution of the board of directors for the payment of the debts of the corporation, and certainly as against his co-defendants entitle him to the money in question.

As it respects the exception to the depositions of several of the witnesses, for the failure to answer the seventh interrogatory proposed to them by Marsh, it may be sufficient to say that its pertinency is not discoverable. It calls upon them to state what amount of the bills of the Tombigbee Rail Road Company they held at a definite time, what disposition has been made of them, &c. No direct answer to this question could have affected the assignment to Walsh, or supported that to Gibson.

Other questions are suggested by the answer and proofs, but those already considered are decisive of the case, and we will add nothing more than to declare that the decree of the Court of Chancery is affirmed.

HAMPTON v. SHEHAN.

1. It is no valid objection to a suit that it is brought for the benefit of the principal in the note, which is sued as against a surety only, and two other persons as executors of an estate.
2. One joint executor may lawfully take a note with surety from his co-executor, for the purchase money of estate sold by them jointly as executors.

Writ of error to the Circuit Court of St. Clair.

ASSUMPSIT by Hampton describing himself as executor of the estate of Joel Chandler, deceased, and as suing for the use of Sarah Chandler, executrix, and James Hampton and Joel Chandler, executors of the last will and testament of Joel Chandler, Sr. deceased, against Shehan as the joint maker with Joel Chandler and Henry McCoy, who are not sued, of a promissory note payable to Hampton, by the description of James Hampton, executor of the estate of Joel Chandler, deceased.

The defendant, with other pleas, pleaded as follows: "That Joel Chandler, who is one of the makers of the said note in the declaration mentioned, and the Joel Chandler, who is one of the plaintiffs for whose use the suit is brought, is one and the same person; and that the said Chandler was one of the executors of the last will and testament of Joel Chandler, deceased, when the said note was made, and when the same became due, and is so yet, and during all the time hath been, and that he is the principal in the said suit and the defendant but a surety, wherefore," &c.

To this plea the plaintiff demurred, but the Court overruled his demurrer: he pleaded to issue, and a verdict was found againt him.

This, with other matters, is now assigned as error.

S. F. RICE, for the plaintiff in error, said this was materially different from the case of Chandler v. Shehan, supra, as here the promise was made directly to the co-executor. [Wentworth v. Ex. 224; Clark v. Griffin, 6 Ala. Rep. 387.]

Pope, for the defendant in error, cited the same cases and relied on the same argument as in Chandler v. Shehan, supra.

GOLDTHWAITE, J.—We are unable to see any reason upon which the demurrer to the plea was overruled. The validity of the consideration for which the note was given, is admitted by the omission to controvert it, and therefore the proposition asserted by the plea seems to be, either that the note cannot be enforced in an action at law, as having been given by one executor of an estate to another; or because the suit cannot be sustained for the use of the principal maker of the note, in connection with others, in a representative capacity, where his surety is the defendant to the suit. This is essentially different from the case of Chandler v. Shehan, recently determined, and in no manner involves the same principle.

In considering the soundness of this plea we shall examine, 1st. The effect which the note declared on produces on the action: and 2d. The legal effect of the note assuming it to be given for a consideration connected with the assets of the estate. Neither the consideration, or its connection with the assets, is disclosed in the pleadings, and for this reason, independent of any other, the demurrer should have been sustained; but as the judgment of the Court below may have turned on the latter point it is not improper to be examined.

The practice, so common in our Courts, of disclosing in the declaration for whose use a suit is brought prevents the abatement of the suit, when the nominal plaintiff dies before its termination, and makes the *usee* liable to a judgment for costs. [Clay's Dig. 316, § 22; 313, § 3.] Beyond this, it is nothing more than an admission of record that the beneficial interest is in others, besides the party suing. [Brown v. Foster, 4 Ala. Rep. 282.] If the admission in this case went so far as to show that Chandler, the principal in the note, was entitled to the sole beneficial interest, there would be much reason for his surety to claim exemption from suit; on the principle that the law abhors and avoids circuity of action. Therefore it is in most instances, that a defendant will be permitted to show as a defence, that the actual plaintiff, if a recovery is had, will be liable to reimburse or indemnify him. But

to let in such a defence the liability to reimburse, or to indemnify, must be co-extensive with the claim or demand which it is proposed to defeat. [Webster v. Randall, 19 Pick. 13.]

The admission here is, that Hampton, the nominal plaintiff, is a trustee for the joint benefit of a third person and the principal in the note sued on against a surety as well as himself, not as individuals, however, but as the representatives of an estate. It is evident that Chandler, in his representative capacity, is not bound to reimburse or indemnify Shehan for any loss which may be the consequence of this suit; though as an individual he is bound to save his surety harmless. As the interest of Chandler in this suit is not in the same right as that in which he is bound to reimburse, nor co-extensive with that sought to be enforced, it does not fall within the rule before stated, and therefore, the interest disclosed by the declaration alone, or in connection with the plea, furnishes no bar to the action.

The other point, as we have seen, is not contained in the plea, but we consider it, to prevent the cause from returning to this Court on that ground.

2. At an early day it was held in this Court, that one executor might sue another at law, upon an express promise. [Phillips v. Phillips, 1 Stew. 71.] There, however, the plaintiff was a legatee as well as an executor, and the estate had been settled except the single transaction. Although this decision is in accordance with our own judgment, we shall endeavor to show it to be well sustained by analagies entirely satisfactory, though it is laid down in a recent work upon the duties and powers of executors, that in general one cannot sue another at law. [Wms. on Ex. 627.] It was considered in Brannan v. Oliver, 2 Stewart 47, that an executor might lawfully purchase at his own sale, especially if he has an interest; and such is the rule in Virginia under statutes less favorable to executors than our own. [Hudson v. Hudson, 5 Mum. 180; Anderson v. Fox, 2 H. & M. 245; Mackay v. Young, 4 Ib. 430.]

The law is considered otherwise by the English Courts where an executor is classed with other trustees, and inhibited from purchasing the trust estate. [Wms. on Exr's. 613.]

Though if he pays a debt out of his own money, he may elect to take any specific chattel as his own, and by such election the property is changed. [Ib. 409.] If an executor may lawfully become the purchaser of the estate of his testator at a public sale, it would seem impossible to interpose any valid objection to the claim of one executor to do so, when others are joined with him in the execution of the will; and upon such a purchase the question immediately arises, whether all the executors become responsible for the sum of the purchase, or whether he who purchases alone is so.

It is laid down in most of the elementary works as a general rule, that each executor is responsible only for his own acts, and for the assets which came to his own hands—3 Bac. Ab. 31; and it is the well settled course of decision, both at law and in equity, that one of several executors cannot discharge himself by showing that the assets which came to his hands were transferred by him to a co-executor. [Cross v. Smith, 7 East. 246; Langford v. Gascoigne, 11 Vesey, 333; Edmunds v. Crenshaw, 14 Peters.] It is evident there would be a peculiar hardship in applying the latter rule, so as to make one executor liable for a purchase by another, and this too, when there was no power to prevent the purchase. On the other hand, it would probably be pernicious in the extreme, if one executor, through the medium of a purchase, could possess himself of the entire estate, in defiance of the wishes of those who are associated with him in the trust. The cases to which we have given a reference, establish, that a purchase by an executor at his own sale is valid, and that of Childress v. Childress, 3 Ala. Rep. 752, decides that the sum of a note thus given for the purchase money, may be properly charged to him in his settlement with the Orphans' Court. Such, doubtless, is the true rule where all the executors assent to the purchase. But how is the money to be secured when the co-executors are not prepared to, or do not, assent to an appropriation by the other? Can it be supposed they have no means to protect themselves from loss or injury by requiring security from the purchasing executor? We consider it entirely clear, therefore, to avoid those consequences, induced by the conclusion, that a valid purchase may be thus made, that the other executors, or any one of them, may require security from the pur-

chasing executor, and that a note given for such a consideration must be sustained. What the consequences may be with respect to the settlements between co-executors, or with legatees or distributees, should not now be adverted to.

The result of our judgment is, that the demurrer should have been sustained, and as this is conclusive of the case, the other questions are not examined. Reversed and remanded.

MOSBY v. STEELE & METCALFE.

1. During the interval which must elapse between the interlocutory and final decree in bankruptcy, the bankrupt has an inchoate right to the property which he may acquire during such interval. But as the creditors have also the right until the final decree and certificate granted to coerce payment of their demands, and may therefore seize such property by execution, a Court of Chancery will interfere and by injunction protect the bankrupt in the enjoyment of such property, until it can be ascertained whether he will obtain his discharge, the creditor being protected by an adequate indemnity.
2. The Chancery Court of the State in which the debtor resides, and not the Federal Court is the proper tribunal to afford relief.

Error to the Chancery Court of Sumter.

The bill was filed by the plaintiff in error, and charges that at the July term, 1842, of Sumter County Court, the defendants recovered a judgment against him for $587 68. That at the May term, 1843, of the District Court of the United States, he was declared a bankrupt according to the provisions of the act of Congress. That after the decree, his friends assisted him to procure a quantity of groceries, which were designed as supplies for a public house he intended opening, to enable him to support his family. That the defendants knowing these facts, and that their debt was embraced in his schedule, caused an execution to be issued on their judgment and levied on the groceries, and that the sheriff was proceeding to sell them. The bill further charges, that if the goods are sold he cannot carry on his business. That he expects to obtain his final discharge

as a bankrupt, and prays that the defendants may be enjoined from proceeding until the final hearing of his petition, and that if he obtains his discharge that the injunction be made perpetual.

The defendants answered, admitting the material allegations of the bill, but insisting that the complainant had an adequate remedy at law.

Subsequently the complainant filed a supplemental bill, setting forth the proceedings in bankruptcy and his final discharge, since the filing of the original bill, which was also answered by the defendants, admitting the facts and insisting that there was an adequate remedy at law.

Reavis, for plaintiff in error, cited the Law Reporter for May, 1842, 19, Id. August, 1842, 163, and the 4th section of the Bankrupt law, to show that nothing but the final certificate discharged the bankrupt from his debts. To show that the bill was properly filed in the Court of Chancery, and could not have been filed in the District Court, he cited 6 sec. Bankrupt law; 4 Cranch, 179; 2 Story's Eq. 186.

Metcalfe, contra, contended that the bill should have been filed in the District Court of the U. States, *Ex parte* Foster, 55 Law Rep. June, 1842, and *Ex parte* Martin, Id. Aug. 1842.

That there was an adequate remedy at law (4 Ala. Rep. 572) for the abuse of the process of the Court. And at all events that an action would lie for the recovery of the property if improperly sold. That a bill in Chancery could not be entertained but under peculiar circumstances to recover specific property. [3 Ala. Rep. 347.]

ORMOND, J.—By a decree in bankruptcy all the property of every description of the bankrupt is transferred to the assignee in bankruptcy, except such articles as by the proviso to the third section, the assignee may permit him to retain. It would seem therefore entirely reasonable that in the interval which must elapse between the decree and the final hearing for the bankrupt's discharge, he should be permitted to hold property subsequently acquired, as otherwise he would not be able to support himself and family. In the matter of B. Grant, in the Circuit Court of Massachusetts, Judge Story, upon this point, says, "I know of no reason why a bankrupt

may not enter into business and hold property, subject of course to the contingency of obtaining a discharge; for if he fails to obtain a discharge, all his property will at last be subject to the claims of his creditors." [Law Rep. May, 1842.]

It is also very clear, that until the final discharge of the bankrupt, he cannot prevent his creditors from seeking to coerce their debts by law, as was held by this court in Givens v. Robbins & Paynter, 5 Ala. Rep. 576, and also by Judge Story, in the matter of Jonathan Cheney, Law Rep May, 1842, because until that is obtained, it cannot be known that the bankrupt ever will be exonerated from the payment of his debts.

As, therefore, it is only the final decree and certificate which discharges the bankrupt from the payment of his debts, the creditor had the right to sue out his execution at the time he did, and the sheriff was consequently bound to levy it, as there is nothing in the bankrupt law protecting property which he may acquire in the interval which must elapse between the interlocutory, and the final decree. Doubtless the bankrupt has an inchoate right to the enjoyment of such property free from the claims of his schedule creditors. How is he to be protected in the enjoyment of this right? It is suggested that he may bring trover or trespass for the property, after he obtains his certificate. It might, perhaps, be well doubted whether a sheriff could be converted into a trespasser by matter subsequent, having the right to levy when he did. But conceding such to be the law, is the bankrupt in the meantime to be deprived of the power of acquiring any thing for the support of himself and family, and to depend on common charity, having already deprived himself of every particle of property which he previously owned for the benefit of his creditors? It must, we think, be evident that the right to sue, after he obtained his certificate would be a very inadequate protection.

In Lockhart v. McElroy, 4 Ala. Rep. 572, we held, that an execution might be superseded if any unjust or improper use was attempted to be made of it; but that decision does not reach this case; because the plaintiff, as has been shown, has the right to do what he is attempting to do, and cannot therefore be restrained by a court of law from acting. The only adequate remedy seems to be the one sought in this case. A Court of Chancery can not only prevent the seizure and sale of the

property, until the bankrupt can ascertain whether he can obtain his certificate of discharge, but it can also protect the creditor from loss or injury, by requiring indemnity from the bankrupt for the temporary suspension, if he should fail to obtain his certificate.

The jurisdiction of the Court in cases like this, is referrible to its head of preventive justice, in which it interferes to prevent great if not irreparable injury.

We think it cannot admit of doubt that the application was properly made to the Court of Chancery of this State. In a case in principle, upon this point, analagous to this, Judge Story held that the jurisdiction of the State Courts over their own Courts was exclusive, unless some authority had by law been conferred on the Courts of the United States, either expressly or by necessary implication, to intermeddle with it. [Law Rep. for May, 1842, 22.] From the view we have taken it appears that the Chancellor erred in dismissing the bill, and as it appears from the supplemental bill and answer that the plaintiff in error has been allowed his certificate of final discharge as a bankrupt, under the act of Congress, the decree of the Chancellor must be reversed, and a decree be here rendered, perpetually enjoining the defendants in error from further proceedings under their execution.

Let each party pay his own costs in this Court and in the Court below.

WILSON v. AULD, EX'R.

1. The judgment entry recited, that the defendant's attorney moved to quash the execution and return "on the ground of irregularity, the same having been issued contrary to law, to an improper officer, and the return having been made by an officer legally incompetent to act in the premises; being seen and heard by the Court, the same is granted, and the execution and return accordingly quashed."—*Held*, that the reasons stated in the motion to quash are conclusions of law, without any affirmation of fact on which they rest; and the execution appearing upon its face to be regular, and there being nothing upon the record to show that it was addressed to, or executed by an improper officer, the judgment by which it was quashed cannot be sustained.

Writ of Error to the County Court of Mobile.

It appears from the record in this case, that the plaintiff recovered a judgment against the defendant, in his representative character, and that an execution issued thereon, addressed "to any sheriff," &c., requiring to be made the amount, &c., adjudged to the plaintiff, of the goods and chattels of the testator in the defendant's hands, to be administered, &c. This execution appears by the indorsement thereon, to have been received by the sheriff of Mobile, who returned the same "no property found," &c.

In the transcript there is an order in these words: "Levin J. Wilson v. Alexander Auld, executor. This day came the parties, by their attorneys, and the motion of the defendant's attorney to quash the execution and return in this case, on the ground of irregularity, the same having been issued contrary to law, to an improper officer, and the return having been made by an officer legally incompetent to act in the premises, being seen and heard by the Court, the same is granted, and the execution and return accordingly quashed." It is here assigned for error, that the County Court, without any sufficient reason, quashed the execution.

J. A. Campbell for the plaintiff in error.
No counsel appeared for the defendant.

COLLIER, C. J.—The execution in question is regular on its face, and there is nothing to show that it was addressed to, or executed by, an improper officer. If the sheriff had an interest that disqualified him from acting in the case, the party objecting to the irregularity of the proceeding, should have caused the fact to be stated affirmatively on the record. The general reasons stated in the motion to quash, viz: irregularity, and the direction to an officer legally incompetent, are mere conclusions of law, without any affirmation of fact on which they can rest. The judgment of the Court is at most a mere assent that the motion should be granted, and an order accordingly. We often make intendments to sustain judgments in suits prosecuted in the ordinary mode of procedure, where there is something of which such an intendment may be predicated, or it is not inconsistent with the record. But in cases

like the present, the same liberal presumptions are not indulged; and if they were, there is nothing but the order upon the motion and the execution itself to which we can look.

In Burns v. The State, (5 Ala. Rep. 227) the Circuit Court taxed the prosecutor with the costs, but the judgment did not state, it appeared to the Court, that the prosecution was frivolous and malicious. This Court said, "in order to support a summary conviction for costs in any prosecution, the reason must be stated and shown upon the record. We can conceive no judgment whatever, which can be rendered by a Court, without a sufficient reason appearing for it; and the present does not seem to be a case of exception to the general rule."

The case cited is an authority in point, and shows that the order quashing the execution was irregular, and it is consequently reversed.

DISTRIBUTEES OF KNIGHT v. GODBOLT, ADM'R.

An administrator, when cited to a final settlement by a distributee, is entitled to show a retainer of assets for any just debt due to himself, although within the bar of the statute of limitations, so that it is without the period of time when the presumption of payment would arise.

Appeal from the County Court of Mobile County.

This proceeding in the County Court was the final settlement of the estate of James Knight, deceased, by Godbolt, administrator *de bonis non*. Among the items charged against the estate were several promissory notes made by Knight in his life time, to Godbolt, which had been past due for more than six years before the death of Knight.

The counsel for the distributee objected to the allowance of those items in the account. The Court however, admitted them, and this is assigned as error.

LESSESNE, for the plaintiff in error, insisted that an administrator is not permitted to take a debt due to another out of the control of the statute of limitations by admissions of its justice. [Thompson v. Jeter, 12 Wheat. 565; Peck v. Belsford, 7 Conn. 186; Doe v. McLosky, 1 Ala. Rep. 741.] For the same reason, an administrator will not be allowed to retain for a debt over due him, which is barred by the statute at the time of the intestate's death. [Richmond, Ex parte, 2 Pick. 569; Rodgers v. Rodgers, 3 Wend. 503; Bond v. Smith 2 Ala. Rep. N. S. 663.]

JOHN GAYLE, contra, argued that the right of an administrator to retain for his own debt, is not controlled by the statute. [Wms. on Executors, 685; Toller Ex. 295; 2 Paige, 109; 1 Lomax on Ex. 417; Maddox, 583.]

If the administrator has assets in his hands, his debt is extinguished at the common law. [2 Wms. on Ex. 816 to 818; 1 Salk. 304; 1 Lomax 417.]

A debt of a third party is not extinguished, nor is the administrator compelled to plead the statute. [13 Mass. Rep. 164; Wms. on Ex. 1110; 1 Ala. Rep. N. S. 663.] As the administrator can pay debts to others which are barred, he can also pay himself. [Wms. on Ex. 693; Maddox, 583; Lomax, 417; Minor, 353; 15 Vesey, 458.]

GOLDTHWAITE, J.—All the elementary treatises upon the rights and duties of executors and administrators treat of their right to retain, in preference to any other creditor, any debt in equal degree. [Wms. on Ex. 685; Toller on Ex. 295; Lomax on Ex. 417.] This was unquestionably the law previous to the enactment of the statutes of limitation, and we are not aware there is any decision afterwards made in the English Courts, which limits this right. Indeed, it would be unreasonable that an administrator should be clothed with the power to charge the estate of his intestate with a debt due to another, although within the bar of the statute, and yet be remediless with respect to his own. The only case in which the precise question here made seems to have been agitated in England, is that of Hopkinson v. Leach, Madd. Pr. 583, when Sir John Leach thought the retainer was good, but di-

rected the opinion of a Court of law should be taken. Whether it ever was taken does not appear. The reasons why an administrator is allowed to retain in preference to any other creditor of equal degree at the common law, are forcibly stated in the case of Chapman v. Turner, 11 Viner's Ab. 72, and are equally applicable to the retainer for a debt barred.

What was said by this Court in the case of Doe v. McLoskey, 1 Ala. Rep. N. S. 741, must be construed with reference to the facts then before the Court, and have no application to the retainer of a debt out of the personal estate.

The case of Rodgers v. Rodgers, 3 Wend. 503, certainly sustains the plaintiff in error, but the only reason given for that decision on this point is, "that the right of retainer should not place the executor in a better situation than other creditors, as to the kind of debts that he may retain." Therefore, it was then said, "he cannot retain a debt which he could not recover if he stood as creditor simply, and not as executor." This reasoning certainly is not satisfactory, because if a retainer in a case like this is not permitted, so far from standing better, he should be in a worse condition, because the creditor in such a case may sue, and must recover if the bar is not insisted on by plea. He could also avoid the plea, by showing an express promise by the administrator.

All the other cases cited are those where the personal representative, or a creditor, was pursuing real assets descended to the heir.

Over these the personal representative has no control whatever, and neither action or admission by him, can affect the heir, who, representing his ancestor, is entitled to plead the statute or waive it at his own discretion. Such was the case of Bond v. Smith, 2 Ala. Rep. N. S. 663, and similar in principle are the others.

The case of an insolvent estate has been supposed as one of great hardship, if this rule is declared, but to such the doctrine of retainer has no application. There, the Judge of the County Court, or Commissioners, determine on the validity of the claims, and it is probable the administrator would stand only as any other creditor.

Our conclusion then is, that when the administrator is cited to a settlement by a distributee, he is entitled to show a retainer

of assets for any just debt due to himself, although within the bar of the statute, but without the period when a presumption of payment would arise.

The result of this conclusion is, the affirmance of the judgment of the County Court.

[This case was again argued by CAMPBELL for the plaintiff in error, at the January Term, 1845. In addition to the authorities previously cited, he relied on Shewer v. Vanderhost, 1 Russ. & M. 347; De Tastet v. Shaw, 1 B. & A. 664.]

GOLDTHWAITE, J.—The additional cases cited upon the re-argument of this cause, do not materially affect the principle on which our former decree was rested. That principle is, that as an administrator is in no case bound to insist upon the bar of the statute of limitations, when sued by another, he may retain for his own debt in the same condition. Lord Brougham, in the decision of Shewer v. Vanderhorst, 1 Russ. & M. 347, does not deny the principle, but takes the distinction, that when an administrator of the estate is drawn into equity, a creditor, or volunteer may raise the objection, although the personal representative declines to do so. Whatever the authority of the case may be, it would be entirely a different matter to decide, that an admission by the administrator was of no value; or that his right of retainer was gone, because there was no one to admit, or give effect to the moral obligation which rested on the conscience of his intestate. The case of De Tastet v. Shaw, 1 B. & A. 664, proceeds upon the technical ground, that an equitable demand, requiring an account to be taken, is not the subject of retainer. The observation by Lord Ellenborough, in that case, that justice cannot be administered without affording the plaintiff, an opportunity of controverting the amount of the debt, doubtless applies to all cases; but there is a marked distinction between the right to controvert the amount of a debt, and that of insisting on a statutory bar, which in all other cases but his own, the administrator is clothed by law with the discretion to waive.

The common law seems to place an administrator, in every condition of his intestate's estate, in the stead of the party

whom he represents, with the single exception, that all personal actions were extinguished by his death. In the progress of society, many modifications of this policy has doubtless become necessary, and it is very possible that the discretion of the administrator, both as to admissions to bind the estate, as well as his right to retain, may be proper; but these modifications belong to the legislature, and not to the Courts of law.

Judgment affirmed.

BRANCH BANK AT MONTGOMERY v. SYDNOR, USE, &c.

1. Where an agent to whom a note as such agent is made payable, entrusts it to an attorney for collection, who fraudulently transfers the note to a Bank, which collects the money, the agent cannot maintain an action for money had and received to his use against the Bank. The law will not raise an implied promise except in favor of the owner of the money.

Error to the Circuit Court of Montgomery.

Assumpsit by the defendant against the plaintiff in error. It appears by a bill of exceptions that the plaintiff below, as the agent of McCargo, sold certain lands to Tod Robinson, taking from him two promissory notes payable to himself as agent of McCargo, each for $666 33, which notes were indorsed by William Robinson. These notes the plaintiff put in the hands of one Alanson Hardy for collection, taking from him a receipt, by which he promised to collect the notes and account for the money or return the notes, either to the plaintiff or McCargo. It further appeared in evidence that the indorsement of William Robinson was erased, and the indorsement of the plaintiff forged, and other indorsements made thereon, and that the notes in that condition were by Hardy delivered to the Bank in payment of his own debts. It further

appeared that the executors of Tod Robinson had paid the notes to the Bank.

The Court decided that the action could be maintained by the agent for the money, to which the defendant excepted. This is the only error brought to the notice of this Court.

Elmore, for plaintiff in error, argued that the action could not be maintained by the agent against the Bank. He admitted that an action could have been maintained by him against Tod Robinson, on the express promise. He insisted that the doctrine was, that an agent could not sue unless there was an express promise to him as such, or unless he had an interest in the subject matter of the suit. He cited 1 Chitty's Pl. 1, 8; 10th Barn & C. 671; 4th B. & Ald. 437; 4 B. & C. 664; 10 Wend. 156; 11th John. 23; 1 Camp. 337; 6th John. 94; 10 Id. 388; 4th Taunt. 1; 6 Id. 66.

Hayne, contra, maintained that either the principal or agent might sue. That the fact that the note had been improperly collected by the Bank, did not vary the case. He cited Cowper, 805; Paley on Agency, 259; 8 Conn. 60; 8th Mass. 103; 4 Yerger, 29; Chitty on Bills, 144; 8th Taunt. 114.

ORMOND, J.—The only question presented upon the record is, whether the action can be maintained by the agent upon an implied promise. It is clear that the Bank has no title to the money, which belongs to McCargo, and it is not shown that the agent has any interest in it, or that he is in any way liable to the plaintiff for it; nor is there any privity of contract between the Bank and the agent, the former having obtained the note on which the money was collected, not from the agent, but from an attorney to whom the agent entrusted it for collection. Under these circumstances we are of the opinion that a promise cannot be implied to pay the agent.

An agent cannot sue in his own name, unless upon an express promise to him, [Piggott v. Thompson, 3 Bos. & Pul. 146,] and this principle may be said to be universally acknowledged. The note upon which this money was collected having been made payable to the defendant in error, as the agent of McCargo, he could doubtless have maintained an action upon it in his own name, as there was an express promise to him.

This action is upon the promise which the law implies from the Bank, who has no right to the money, to pay it to the true owner. That is not the defendant in error, he was a mere agent for collecting it, and does not appear to have had any interest whatever in it. He has therefore not the legal title to the money, and it is only in favor of the legal title that the law raises a promise to pay; that is, unless it is the money of the plaintiff it is not received to his use, which is the theory upon which the action for money had and received is maintainable. This is the doctrine of the text books, sustained by adjudged cases.

Thus, where A. had sued upon a bill of exchange as the trustee of another, and the attorney had received a sum of money which A. brought an action to recover; upon proof that he was a mere agent, without interest, it was held he could not maintain the action for money had and received to his use. [Clark v. Dignum, 3 M. & W. 478; see also, Middleham v. Eiche, Ib. 407; Randall v. Bell, 1 M. & S. 714; Harding v. Hall, 10th M. & W. 42; Smith et al v. Goddard, 3 B. & P. 466; Brown on Actions at Law, 522.]

The case of Stevenson v. Mortimer, [Cowp. 805,] cited to establish the contrary doctrine, is a mere dictum. The action there was by the principal, and it was contended, that as the fees were unlawfully extorted from the agent, the master of a ship belonging to the plaintiff, that he alone could maintain the action. The Court held the action well brought by the principal, on whose account the money had been illegally extorted and paid, and added that either the principal or agent might maintain the action. It is obvious the question was not presented, or necessary to be decided. If, however, it was, it is opposed by the entire current of authorities in England and the United States.

Let the judgment be reversed and the cause remanded.

WHEAT v. LOWE.

1. In an action of trespass for biting and bruising the plaintiff's finger, so that it became necessary to amputate it, it is not permissible to prove that the plaintiff was a man of drunken and dissipated habits about and after the time of the alledged trespass; so as to lay a predicate for the jury to infer, whether the loss of the finger did not result from a condition of the system, superinduced by intemperance.

Writ of error to the County Court of Sumter.

This was an action of trespass, assault and battery, at the the suit of the defendant against the plaintiff in error. Among other injuries to the plaintiff's person, the declaration alledges the biting, bruising, &c. of his finger by the defendant. The cause was submitted to a jury, but on what issue the record does not inform us. From a bill of exceptions sealed at the instance of the defendant, it appears that at the time alledged in the declaration a fight took place between the plaintiff and defendant; that during the rencounter the defendant bit the finger of the plaintiff, so that it became necessary to amputate it. Whereupon the former inquired of a witness of the latter, if the plaintiff was not a man of drunken and dissipated habits about and after the time of the alledged trespass; which interrogatory being objected to by the plaintiff, the defendant explained the object he had in view in making the inquiry, viz: to put the jury in possession of the fact, that they might infer whether the loss of the plaintiff's finger did not result from a state of health superinduced by intemperate habits. The Court sustained the objection and adjudged the evidence sought to be elicited, inadmissible.

The jury assessed the plaintiff's damages at six hundred dollars, and a judgment was rendered accordingly.

S. W. Inge, for the plaintiff in error, insisted that the evidence was clearly competent in mitigation of damages. The explanation given of the object proposed by it, was enough to show its relevancy. He cited Smith v. The Branch Bank at Mobile, and Cuthbert v. Newell, both decided at this term.

R. H. Smith, for the defendant in error. If the question proposed and excluded had been answered affirmatively, it could have had no influence in enabling the jury to assess the damages. The testimony sought to be elicited was too general to have led to any definite result; and it was not allowable to prove by a physician the effect of intemperance upon the human system in a case like the present. [2 Phil. Ev. 428, 434–'5; Brindle, et al. v. McIlvaine, Sergt. & R. Rep. 282.]

COLLIER, C. J.—That it is competent for the defendant in an action of trespass, to adduce evidence to mitigate the damages, is an acknowledged principle. The admission of such proof like all other, that may be offered to a jury, is controlled by settled rules, calculated to achieve equal justice between litigants. Thus it is competent for a defendant to reduce the recovery against him, by showing, that he acted under a sudden provocation not amounting to a justification, and many other facts of a kindred character. But the intemperate habits of a plaintiff in an action for an assault and battery, can have no influence upon the assessment of damages against the defendant, without connecting such proof with something else as a consequence. Here no evidence was offered, either to palliate or excuse the trespass with which the defendant was charged; but it was attempted to elicit facts as a predicate, from which to infer, that a consequence of the battery may have resulted from the plaintiff's bad habits. Conceding that the amputation of the plaintiff's finger might have been prevented if he had conformed to the proper regimen, yet his imprudence cannot make the defendant less guilty in point of fact. It is not intimated that after the rencounter, the plaintiff became more irregular; the explanation of the inquiry supposes that he was then intemperate and continued so. Certainly it is the moral duty of every man who lives in the indulgence of any vice to reform his life, and of none more than the habitually intemperate. But the law cannot permit a man's habits, to determine the value of any member of his body.

If the plaintiff, either designedly or from mere carelessness, so treated the wound as to render amputation necessary, perhaps the jury should not estimate its loss in admeasuring

damages; but if there was no change of habit for the worse, between the time of the fight and the loss of the finger, we think it may be considered as a direct consequence of the trespass and compensated by the jury. If the injury had not been inflicted, the loss would not have followed. The plaintiff was not bound to change his mode of life in order that the defendant could repair the trespass by a smaller amount in damages. It was enough for the former to be the loser by his intemperance, the latter cannot be gainer.

We think the evidence was properly excluded, and the judgment is therefore affirmed.

THOMPSON, ET AL. v. HAIR.

1. After judgment by default, where the process is a judicial attachment, a return of "not in time to execute," to the *Ca. Ad. Res.*, will be considered as a general return of not found. *Quere*—Whether in any case where the process is by attachment, advantage of defects in the process are available, where no plea in abatement has been interposed?

Writ of error to the County Court of Sumter.

HAIR, as administrator of Wallace, sued out a writ returnable to the February Term, 1843, of the County Court, against Thompson and others: this writ was received by the sheriff on the 6th of February, and returned on the 10th, "not in time to execute." The second Monday, which is the time fixed for the session of the Court, fell upon the 13th day. It was made to appear to this Court, that the defendants were residents of the county when the writ issued, and a judicial attachment was allowed. Upon this, property was seized and replevied by the defendants, who suffered a judgment to go against them by default. The transcript shows by a certificate at its close, that upon the allowance of the writ, the sheriff

came to the Clerk's office and amended the return so as to read, "not found in my county."

It is now assigned for error, that the judicial attachment was irregularly sued out.

INGE, for the plaintiff, relied on the decision made in Wyatt v. Campbell, Minor, 390; 9 Porter, 218.

The amendment of the return not having been made with the leave of the Court, is a nugatory act. [4 Ala. Rep. 155, 537.]

HAIR, *pro se*, cited Maverick v. Duffee, 1 Ala. Rep. N. S. 433; Mayo v. Stonum, 2 Ala. Rep. 390.

GOLDTHWAITE, J.—We think the objection to the form of the return upon the writ, is unavailing at this stage of the proceeding.

It is certain the return is not a regular one, nor in the precise words of the statute; yet no one can mistake its meaning, which is, that the defendants were not found, because the writ was received at too late a period to be executed. Under the statute a judicial attachment is allowed as a mode of service whenever the defendant is a resident of the county, and the return is not found. It is entirely immaterial to the plaintiff, whether this return is induced by the absence of the defendant, or the inability of the sheriff to find him. We think the judgment must be affirmed on the return as it appears in the record, and without reference to the amendment, which seems to have been very irregularly made, and without any competent authority.

Independent of this, it might well call for consideration, whether a judgment would, under the construction now given to the attachment law, in any case be reversed, for a defect in the process, where the defendant has omitted to avail himself of it by plea in abatement.

Judgment affirmed.

GURLEY v. DAVIS, ET AL.

1. Where one acting as the guardian of a lunatic, purchased for him a life interest in land, of which the lunatic was the remainder-man, and upon his restoration to reason went into possession of the land, retained it two years, cultivating it and taking the profits, and sold it to another and delivered the possession: *Held*, that this was an affirmance of the contract made by the guardian, and that although he could not recover rent from his former ward, yet in equity he might recover the purchase money of the life estate and interest thereon.
2. Whether rent can in any case be recovered, where the relation of landlord and tenant has not in fact existed, but the land has been occupied by the mere sufferance of the owner.—*Quere?*

Error to the Chancery Court of Franklin.

The bill was filed by the plaintiff in error. The facts of the case as shown by the bill are, that the complainant was appointed guardian of Major Davis, a lunatic, during the year 1832, and acted as such until December, 1836, when Davis was declared *compos mentis*, and restored to the possession of his estate. While complainant was acting as guardian, deeming it to be for the interest of the lunatic, he purchased on his behalf, from one Mrs. Anne Davis, her dower interest in a half section of land, for which he agreed to pay annually three hundred and eighty dollars, on the first of January, during her natural life, the first of which fell due first January, 1835. The two first instalments were paid by complainant, and in his settlement with the County Court he was allowed credit therefor.

Upon the restoration of Davis to his rights, he took possession of the land purchased by the guardian, and in February, 1839, sold and conveyed one half thereof in fee simple to one Drury Vincent, the remaining half being also sold to him by one Alexander Carter and his wife, who, together with Davis, were entitled to the remainder in the land after the death of Mrs. Davis. At this time Mrs. Davis was not dead, but lived some years afterward.

The annuity for the years 1836 and 1837 being unpaid, Mrs. Davis brought suit therefor against Major Davis, which he defended, and from the payment of which he was exonerated by

the decision of the Court, in the fall of 1839. Since that time the complainant has paid the annuities for the years 1836-7-8 and 9. Davis having left the State, attachments were prayed for against Vincent, and one Washington, as debtors of Davis, and served. The object of the bill was to obtain a conveyance of the title from Mrs. Davis to complainant, and rent from Major Davis, which it was alledged and proved was worth much more than the annuity. Mrs. Davis died pending the suit in 1843.

The Chancellor, considering, that as the purchase was made by complainant as guardian, and not for himself, he was not entitled to a conveyance of the land if Mrs. Davis had been alive and able to convey, and therefore could not recover rent. But as Major Davis had, by taking possession and selling the land, affirmed the contract made by the guardian, the latter was entitled to recover from Davis the money he had paid under the contract for the life estate of Mrs. Davis, and decreed accordingly, and gave him a decree for the amount in the hands of the garnishees. From this decree the complainant prosecutes this writ.

Nooe, for the plaintiff in error, insisted on the right of the complainant to rent for the land during the life of Mrs. Davis.

ORMOND, J.—The only hypothesis upon which the claim for rent which the plaintiff in error asserts, can rest, is, that Davis, the former lunatic, upon his restoration to reason, and to the charge of his estate, refused to confirm the contract for the life estate of Mrs. Davis, in the land in controversy, which the plaintiff in error, as the guardian of Davis, had purchased for him; and that on this refusal on the part of Davis, the plaintiff in error being responsible for the purchase money, became entitled to the life estate which he had so purchased.

Conceding this hypothesis to be correct, what are the facts in regard to this point? It appears from the bill that upon the restoration of Davis to reason, and to the control of his estate, he was put in possession, by the plaintiff in error, of the land, the life estate of which he had purchased for him; that Davis continued in possession, using it and cultivating it as his own land for more than two years, when he united with the other remainder-man in selling the land, and conveying it in fee to the

defendant, Vincent. As this sale took place some years before the death of Mrs. Davis, the tenant for life, it was a palpable recognition of the purchase of her interest in the land by the plaintiff in error, as otherwise there would be no pretence for giving Vincent the immediate possession of the land. It was said in argument that the sale was made under the impression that Mrs. Davis, as stated by the defendant, Vincent, in his answer, was dead; but this is not proof of the fact against his co-defendant, Davis.

If, however, it appeared conclusively that it was supposed Mrs. Davis was dead at the time of the sale, it would not vary the case. The taking and retaining possession of the land by Davis, with the knowledge that he must necessarily have had, that he was only entitled to the possession in virtue of the purchase for him by the plaintiff in error, was an affirmance of the contract made by the plaintiff in error, for the purchase of the life estate. It could not be tolerated that he should keep possession of the land for more than two years, use it as his own, and take the profits, and then disaffirm the contract by which alone he had the right to possession. In the analogous case of a purchase or sale by an infant, he must disaffirm it in a reasonable time after he attains his majority, or it will be binding on him. We are therefore of the opinion that the acts of Davis, after he was declared to be of sound mind, were in law an affirmance of the contract made by the plaintiff in error, as his guardian, conceding that as guardian, he was not invested with power to make such a purchase, a question which it is unnecessary in this case to discuss.

The act principally relied on to establish the refusal by Davis to abide by the contract, is the defence made by him at law to the payment of a portion of the purchase money, when sued by Mrs. Davis, upon the contract made with her by the plaintiff in error. In Westmoreland v. Davis, 1 Ala. Rep. 299, this Court held, that Davis was not responsible at law in a case similar to the present, upon a promise made by his guardian whilst he was insane. The defence therefore, was merely the assertion of a legal right, and cannot be construed to be a denial of his liability upon a proper proceeding. But if it were otherwise, and was clearly an attempt on his part to disaffirm the contract, it would be unavailing. This defence was inter-

posed in the fall of 1839, nearly three years after he took possession of the life estate, and about eight months after he had actually sold the land, and delivered the possession. It was then beyond his power to disaffirm the contract, if he had desired to do so; but we cannot attain the conclusion that he designed to do so, from an act so equivocal in its character as that relied on.

From this examination, it appears that the plaintiff in error never had any right or title, legal or equitable, to the life estate of Mrs. Davis in the land in question. He purchased it originally for Davis, when he was a lunatic, and it does not appear that the latter ever denied his power to do so, or disaffirmed the contract, but on the contrary, so far as we can form any conclusion from his acts, acquiesced in it, and confirmed it.

Such being the aspect of the case, it is unnecessary to consider whether rent can be recovered, when the relation of landlord and tenant has not existed, and when the only ground upon which an implied promise to pay rent could arise, would be the simple fact that Davis occupied the land by the sufferance of the plaintiff in error. Upon this point see the case of Hull v. Vaughan, 6th Price Ex. Rep. 157.

The Chancellor decreed that the plaintiff in error was not entitled to recover the rent of the land, but was entitled to recover from Davis the purchase money he had paid, and was liable to pay, with interest. In this there is no error, and as this is the only question brought to our view by this writ of error, the decree of the Chancellor must be affirmed.

ROPER v. McCOOK AND ROBERTSON'S ADM'R.

1. The equitable lien of the vendor of land, will pass to his assignee of a note taken from the vendee in part payment of the purchase money, and will not be lost, though the assignee neglect to sue the maker for so long a time, as to discharge the assignor from liability upon his indorsement.

2. To entitle a judgment creditor to go into Chancery to subject the equitable estate of his debtor to the satisfaction of his judgment, (if he has no lien,) he must exhaust his legal remedy, viz: he should show that an execution issued and was returned "no property found."

Writ of Error to the Court of Chancery, sitting at Ashville.

THE plaintiff in error filed his bill, setting forth that James Robertson, since deceased, about the second day of February, 1838, sold to the defendant, McCook, a tract of land situate in the county of St. Clair, (particularly described,) executed a bond for titles and received from McCook his notes for the purchase money. One of these notes, for the sum of two hundred dollars, dated the 2d day of February, 1838, and due on the first of March, 1840, was indorsed by Robertson with all its equities and liens to George M. Duke, and indorsed by the latter to the plaintiff, before any part of the same was paid. On this note thus transferred, the plaintiff brought suit against McCook to the Circuit Court of St. Clair, holden in September, 1841, and recovered a judgment thereon in September, 1842, for two hundred and forty-one 33-100 dollars damages, besides costs of suit; which judgment is still unsatisfied and in full force. *Further*, McCook has no property, either within the knowledge of the plaintiff or the sheriff of St. Clair, by which payment of any part of the same can be coerced by levy and sale.

The bill then alledges the death of Robertson, and that the defendant, Brasher, is his administrator; that the latter, in his representative character, holds another note given by McCook on the 2d February, 1838, to the intestate for a part of the purchase money of the land above referred to; but this note fell due after that of which the plaintiff is the proprietor, and the latter is consequently entitled to the prior lien.

It is then stated that there is no more of the purchase money due for the land than the note held by Brasher, and the judgment in favor of the plaintiff.

The bill concludes by praying that McCook may be compelled to pay to the plaintiff the amount of his judgment with interest and costs, and in default thereof that so much of the land sold by Robertson to McCook as may be necessary, be sold to satisfy the same, together with the costs of the suit in equity,

&c. That subpœnas issue and such other relief as may be proper be granted.

Subpœnas appear to have been served on the parties, and the defendant, McCook, answered the bill. Afterwards the Chancellor dismissed the bill for want of equity, for the following reasons: 1. It cannot be entertained under the pretence of enforcing an equitable lien, because it does not show that the estate of Robertson, the vendor, was not discharged from liability upon the intestate's indorsement, but so states the facts as to make it apparent that it is not chargeable in consequence of the neglect to sue the intestate or his administrator to the first term to which the plaintiff could have sued. 2. The administrator of Robertson still holds one of the notes for the purchase money, and the legal title to the land being in the heirs, who have the interest in the personalty after the debts of the estate are paid, the lien for the payment of this note is superior to that which the plaintiff is asserting. 3. As a bill to subject an equitable title it cannot be supported, because it does not alledge that the legal remedies were exhausted.

Pope, for the plaintiff in error, made the following points: 1. That all the incidents of a mortgage attach to, and control, a contract for the sale of land, where the vendor only makes a bond for titles; it is in fact a sale and mortgage. [Haley et al. v. Bennett, 5 Porter's Rep. 469; Cullum et al. v. Erwin, adm'r, 4 Ala. Rep. 458.] 2. The indorsement of the note to the plaintiff carried with it the lien which the vendor had for its satisfaction, (Emanuel et al. v. Hunt, 2 Ala. Rep. 190; Duval v. McLoskey, 1 Id. 708;) and the priority of the lien where there are two notes, as in this case, depends upon the time when they are respectively payable and were indorsed. [Cullum et al. v. Erwin, adm'r, supra.] 3. An equitable lien is like a mortgage in fact; when it once attaches in favor of an indorsee it is not lost by a failure to sue, or even by the operation of the statute of limitations. But if the law be otherwise, no one but the indorser or his representative can alledge the loss of the lien. 4. The sheriff's return of "no property found," is not indispensable to authorize a resort to equity to reach an equitable title; true it is a very high, perhaps conclusive, yet not the only evidence; and the allegation that process at law

would be unavailing, is sufficiently made in the bill. [Story's Eq. Plead. § 252-3, 240 and note 3; Hartwell et al v. Blocker, 6 Ala. Rep. 585.] 5. The amount due Robertson's estate is set forth and might be brought into the account without filing a cross bill, (Cullum et al v. Erwin, adm'r, supra;) and if a superior lien, might have been first satisfied, and then the plaintiff allowed to satisfy his demand from the proceeds of the land, if any thing was left. He also cited McReath v. Simmons, 15 Ves. Rep. 329; White v. Williams et al, 1 Paige's Rep. 506; Martin v. Lundie, 6 Ala. Rep. 430.

F. W. Bowdon, for the defendant, insisted: 1. The plaintiff lost by neglect, all recourse against his indorser, and the equitable lien against the vendee being consequent upon the indorser's liability, is also gone. [Foster v. The Trustees of the Athenæum, 3 Ala. Rep. 302; Steele v. Kinkle and Lehr, Id. 352; Hall's Ex'rs v. Click et al, 5 Id. 363; Lundie v. Martin, 6 Ala. Rep. 430; White v. Williams, 1 Paige's Rep. 502; see also 7 G. & Johns. Rep. 120.] 2. To have entitled the plaintiff to proceed against an equitable estate, it was necessary that an execution issued upon his judgment should have been returned "no property found." [Screven v. Bostwick, 2 McC. Ch. Rep. 410; McDermott v. Strong, 4 Johns. Ch. Rep. 687; Hadden v. Spader, 20 Johns. Rep. 554; McIlwain v. Willis, 9 Wend. Rep. 548; Beck v. Burdett, 1 Paige's Rep. 305; Edmeston v. Lyde, Id. 637; Clarkson v. De Peyster, 3 Id. 320; see also 1 Litt. Rep. 302; 1 Monr. Rep. 106.] If to the rule stated there be exceptions, the plaintiff's case is not so stated as to bring it within any one of them. [Lucas v. Atwood, 2 Stewt. Rep. 378; 3 Porter's Rep. 470.]

COLLIER, C. J.—We have repeatedly held that where a note or other equivalent evidence of debt is transferred, either by indorsement or delivery, if secured by a mortgage, the mortgage as an incident will pass to the assignee, and he will be authorized to pursue any equitable remedy that the mortgagee could, while he was the proprietor of the paper. [Doe ex dem Duval's heirs v. McLoskey, 1 Ala. Rep. N. S. 708; Emanuel & Gaines v. Hunt, 2 Id. 190.] In Haley et al v. Bennett, 5 Porter's Rep. 452, the vendor of land executed a writing to

his vendee, by which he undertook to make him a deed to the land sold, whenever he should be paid the purchase money therefor. We said, "The particular form of the contract cannot be considered as material. It is to all intents and purposes in the nature of a mortgage, all the equitable incidents of one must attach to the contract." Further, the lien of the vendor for the purchase money may be enforced not only against the vendee, but his assignee, with notice; and this although the vendor may have conveyed the title in due form. To authorize the assertion of the lien in equity against a derivative purchaser, it is not necessary that the vendors should have employed a legal remedy without success. [See Haley v. Bennett, supra; Foster v. The Trustees of the Athenæum, 3 Ala. Rep. 302.]

In Hall's Ex'rs v. Click et al, 5 Ala. Rep. 363, it appeared that the vendor transferred, by delivery, a note which he had received in part for the purchase money, "without recourse on him for its payment." We held that as the note was passed off under an agreement that the vendor should not be looked to for its ultimate payment, the equitable lien did not follow the transfer, and a bill brought by the assignee was consequently dismissed. It was supposed, that the "effect and operation of the agreement produced an extinguishment of the vendor's lien, because so far as he was concerned, it amounted to a payment and satisfaction of his claim. The lien was intended to secure the purchase money to the vendor, and the assignment of the notes without responsibility for their ultimate payment, it is presumed, is equally as beneficial to him as if he had received the amount of them in money."

The case last cited, we think, is not only unlike that now under consideration, in its facts, but its determination was influenced by a different principle. There, we have seen, the lien did not pass to the assignee of the note; here, the bill affirms that it was indorsed, and the vendor became liable to pay it to the indorsee, if the latter would pursue his remedy against the vendee with the diligence required by the statute; or his liability perhaps may be considered a consequence of his indorsement, which will be discharged by the indorsee's neglect. However it may be considered, the legal effect is the same, and will transfer the equitable lien of the vendor, as an incident to

the note. We are aware that there are some adjudications which strongly intimate that the reverse is the law, (see them cited in Hall's Ex'rs v. Click et al, supra,) but the reasoning on which they rest is by no means satisfactory, and they lead to consequences which should be avoided.

Assuming, then, that the assignee of a note given in payment of the purchase money of land, is substituted to the equitable lien of the vendor, where there is no agreement modifying the effect of a general assignment, and the next inquiry is, does the indorsee lose the benefit of this lien, if he neglects to proceed against the maker with promptness. In the case of a mortgage it is said that a mortgagee has three remedies, either of which he is at liberty to pursue, and all of which he may pursue until his debt is satisfied. 1. He may bring an action at law to recover the debt. 2. He may bring ejectment or trespass to recover possession of the mortgaged premises; and, 3. He may foreclose the mortgagor's equity of redemption, and sell the land to satisfy the debt. And if the mortgagee or his assignee have lost the remedy at law to recover the debt, either by the failure to present it in due time to the representative of a deceased motgagor, or the operation of the statute of limitations, still it is competent to go into equity and obtain a foreclosure of the mortgage. [Doe ex dem Duval's heirs v. McLoskey, 1 Ala. Rep. 708; Inge et al v. Boardman, 2 Ala. Rep. 331.]

If the equitable lien of the vendor may be assimilated to a mortgage, as is strongly intimated in the case cited from 5th Porter, then the right to enforce it would survive the remedy by action at law upon the note. And if the vendor may thus proceed to collect the purchase money without reference to his legal remedy against his vendee, why is not his assignee entitled to equal favor. Here it is supposed, that the plaintiff has only lost his recourse upon the indorser's estate, while the liability of the maker (the vendor) is unquestioned, and in fact has been tested by a judgment against him. We cannot think that under these circumstances the plaintiff has no claims to equitable relief. Such a conclusion would make the passiveness of a party prejudice his rights, when there was no positive law declaring that such should be its effect; and when too the indorser by a voluntary payment might again become the

proprietor of the note, and assert the lien in his own name. *Besides,* if the assignee was placed in a condition in which he had no available legal remedy against the indorser, or the maker of the note, the latter might hold the land without paying any thing for it; a result which should certainly be prevented.

It has been so often determined, that it may now be considered a settled rule of law, that to entitle the judgment creditor to go into Chancery to subject the equitable estate of his debtor to the satisfaction of the judgment, (if he has no lien,) he must exhaust his legal remedy, viz: should cause execution to be issued and returned "no property found." And the bill should specifically alledge the fact. [Brinkerhoff v. Brown, 4 Johns. Ch. Rep. 671; Rhodes v. Cousins, 6 Rand. Rep. 188; Hendricks v. Robinson, 2 Johns, Ch. Rep. 283; McDermott v. Strong, 4 Id.; Hadden v. Spader, 20 Johns. Rep. 554; Corning v. White, 2 Paige's Rep. 567; Eager v. Price, Id. 333; Clarkson v. De Peyster, 3 Id. 320; McKinley v. Combs, 1 Monr. Rep. 106; Allen v. Camp, Id. 231; Halbert v. Grant, 4 Id. 580; Scott v. McMillan, 1 Litt. Rep. 302; Screven v. Bostwick, 2 McC. Rep. 410; Perry v. Nixon, 1 Hill's Ch. Rep. 335; Cloud v. Hamilton, 3 Yerg. Rep. 81; Moore v. Young, 1 Dana Rep. 516; Child v. Brace, 4 Paige's Rep. 309; Weed v. Pierce, 9 Cow. Rep. 722.] The allegation of the bill upon this point is defective, but the view taken of the first question is decisive of the case, and the consequence is, that the decree of the Court of Chancery is reversed and the cause remanded.

GINDRAT, ET AL. v. THE MECHANICS' BANK OF AUGUSTA.

1. Where the actual holder of a bill of exchange resides in a different town from that which is the residence of the parties sought to be charged, the notice of non-payment may be given through the post office, by an agent of the holder to whom the bill is transmitted for collection, although the agent and the party notified both reside in the same place. The head note of Foster v. McDonald, 5 Ala. Rep. 376, corrected and explained.

2. It is competent for a Bank, by custom or usage, and consequently by rule, to establish a mode for giving notice to charge the parties to a bill, different from that which obtains in the general commercial law; as for instance, to provide that notice may be sent by the post, even where all the parties reside in the same place, and such a custom, &c., will be binding on the parties to a bill made payable at the particular Bank.

3. It is not necessary to state the existence of such usage or rule in the declaration. The fact alledged, is, that notice was given, and this is proved by either the one mode of notice or the other.

Writ of error to the Circuit Court of Macon County.

ASSUMPSIT, by the Mechanics' Bank against John and John H. Gindrat, as indorsers of a bill of exchange, dated 23d June, 1838, at ninety days, payable at the Branch Bank of Alabama at Montgomery. The declaration is in the usual form, and avers that the defendants had due notice of the protest of the bill for non payment.

At the trial, the bill as well as its protest for non-payment were read in evidence, and the latter contains the certificate of the notary, that notice of the protest directed severally to the drawer and indorsers was deposited in the post office at Montgomery. It was also proved that the bill was deposited with the Bank at Montgomery, by the Mechanics' Bank of Augusta, Georgia, for collection.

The Cashier and President of the Branch of the State Bank at Montgomery were called as witnesses, and the Cashier gave evidence, that he had been in that station since January, 1837. The bill sued on was deposited in that Bank for collection by the Mechanics' Bank. That no usage or custom, existed, so far as his knowledge extended, with respect to the mode of giving notice of protest, on bills or notes deposited for collection; but it had been the uniform custom for the notary to give notice through the post office on paper deposited for collection as its own property; also that the notice thus given, was with the knowledge of the president and directors of the said Branch Bank. At the date of the protest, John H. Gindrat was residing in Montgomery, and both the defendants had been dealers, and transacting business, with the Bank since 1835, and had been protested on paper, before, and after the maturity of this bill. On the 8th of April, 1840, a resolution of the board of directors of the Bank was entered on the

minutes of its proceedings, by which it was resolved, that thereafter, whenever it should be necessary to give notice to any drawers, or indorsers, upon notes or bills payable at that Bank, when the drawers or indorsers reside within the town of Montgomery, it should be given through the post office. This resolution was directed to be published for six weeks in the newspapers of that town. This is the only resolution of the board touching the manner of giving notice, except what is contained in one of the rules adopted by the board at its organization; and which provides, that any note or bill payable at the Bank and belonging to it, shall, if not punctually paid before the closing of the banking house on the last day of grace, forthwith be given to the notary for protest, who, after demanding payment, shall forthwith issue his protest, giving due notice to all the parties. The rule then provides, that parties remaining under protest shall have no accommodation at the Bank, nor any bills, &c., with their names upon it afterwards discounted, and extends all the provisions to notes or bills deposited for collection. The evidence by the president, was, that it had been the invariable custom of the Bank to give notice through the post office. Other witnesses also gave evidence, tending to show the general usage of the Bank to give notice through the post office, to parties resident in the town of Montgomery. It was also proved that the defendants were partners transacting business in Montgomery, although one of them resided at Franklin, in Macon county, at which place was a post office.

The defendants offered several witnesses who had been notaries, or were notaries. One of them deposed, that it was his invariable custom to give personal notice, when the party to be notified resided in the town of Montgomery. Three others were in the usage of giving notice, either through the post office, or personally. The practice of the notary who made the protest in this case, was to give notice through the post office in all cases. It was also in evidence, that two other persons who had been notaries for the bank, were in the usage of giving personal notice as late as 1840, though both also gave notice through the post office. There was also evidence that the firm of John Gindrat & Co. had been dissolved, and a new firm formed, of which the defendants were partners,

under the name of Gindrat, Steele & Co., and that this last firm was dissolved about three months previous to the maturity of this bill.

Under this state of facts, the Court charged the jury—

1. That during the co-partnership, notice to one of the co-partners was notice to all, but if they were satisfied of the dissolution, and it was known to the Bank, or to the plaintiffs, the defendants would be entitled to a several notice; but the co-partnership being established, it devolved on the defendants to show its dissolution; and, as a general rule, to give effect to the dissolution, the firm was required to give actual notice, or notice through the post office, to all with whom they had been in the habit of transacting business, and by publication to the community in general. This was excepted to by the defendants.

2. The defendants requested the Court to charge, that a custom, to change the law of giving notice personally, when the parties to be notified reside in the same town, must be a custom of the Bank, and that as such, it must be fixed, certain and compulsory, while it exists; and that it must have existed sufficiently long, and continuously, for parties to contract with reference to it. And if the jury should believe, that from the year, 1834, to the date of the protest of this bill, that the usage of notaries protesting for the Branch Bank at Montgomery was variant, sometimes giving notice personally, and at other times through the post office, when the parties resided therein; then, that such a usage is not binding on the defendants, and that notice through the post office under such circumstances is insufficient to charge them. This was refused, and the charge given, that a custom to change the law of notice to indorsers, so as to permit it to be given through the post office instead of personally, must be one, fixed, certain, and compulsory, while it exists; and that it must have existed sufficiently long, and have been sufficiently continuous for parties to contract with reference to it; and if such a custom existed with the Bank, the custom or usage of notaries employed by it, could not affect the right of the Bank.

3. The defendants next asked the Court to charge the jury, that no custom of protesting by notaries public, in violation of law, can change, or in any way affect the law itself in its ap-

plication; and therefore, if they should believe that the usage of giving notice to indorsers through the post office, when the parties resided in the same town, was the usage of the notaries, then that such notice is insufficient to bind the defendants in this case, although such usage was afterwards assented to by the Bank, unless the defendant also assented to it. This was given, and in addition to it the Court charged, that if the usage of giving notice to parties residing in the same town, through the post office, commenced with the notaries of the Bank, and the Bank had adopted, conformed to, and established for itself the usage thus commenced, it thereby became the usage of the Bank, and if it had existed sufficiently long for the parties to contract with reference to it, it was binding on the defendants, although the notaries of the Bank may have first commenced the practice.

4. The defendant then asked the Court to charge, that a custom when commenced must be continuous, and when established compulsory, and not left to the option of notaries whether they will adhere to it or not. That the evidence establishing it must be clear, certain, and conclusive. This was given, but with the addition, that if the Bank had adopted the usage of giving notice through the post office, instead of personal notice, and the notaries of the Bank of their own volition, departed from the usage, and sometimes gave personal notice, this was not the act of the Bank, but was the act of the notaries, and that no such departure from the usage of the Bank by the notaries could affect its validity.

5. The defendants next asked the Court to charge, that no custom, or usage, could be established by the Bank at Montgomery in opposition to the law merchant as declared by the statute. That the law merchant, referred to by the statute, means that personal notice shall be given when the parties reside in the same place where the protest is made, and therefore, if satisfied that all the parties resided in Montgomery at the date of the protest, then notice through the post office was not sufficient to charge the defendants. This was refused.

6. The defendants then requested the Court to charge, that under the pleadings, evidence of a special custom varying the general law was inadmissible, and should be disregarded by them. This was refused.

7. The defendants then asked the Court to charge, that under the charter of the Bank at Montgomery the best evidence of its acts, is an entry of the proceedings of its directors upon the books; and if the jury was satisfied that no by-law, rule, or resolution, was passed by the directors of the Bank prior to the protest of the bill, and entered of record on the books of the Bank, then no parol evidence going to establish a usage varying the law requiring personal notice to be given to parties residing in the town where protest is to be made, can be allowed, and in defect of such proof, the jury should find for the defendant. This was refused.

8. They also asked a further charge, that if the jury believed that the plaintiff deposited the bill at Montgomery for collection, and the Bank there, when it fell due, through its notary, had the same protested, the contract must be so construed, as that both parties resided in the same town if the defendants resided there; and that any departure of the notary from the usage of the Bank when protesting for it, affected the notary and the Bank alike, to the holders of the papers deposited for collection, and that the act would operate in the same manner to discharge the defendants. This was refused.

9. Lastly—the defendants asked the Court to charge the jury, that the rule of the Bank adopted at its organization, required the notary of the Bank to give notice according to the law merchant; that the law merchant contemplates and requires personal notice to be given to indorsers when they reside at the town where the protest is made, and should the jury believe this rule was in force on the records of the Bank at Montgomery, when the bill was protested, then that the notice given is not sufficient to charge the defendants. This charge was refused to be given in the terms asked for, but the jury was instructed, that the rule referred to required the notary to give notice according to the law merchant, which requires a personal notice when the parties reside in the same town where the protest is made; yet if the jury were satisfied that a usage of the Bank had been established as deposed to, and that the parties had contracted with reference thereto, then that the notice given through the post office would be sufficient to charge the defendants. The defendant excepted to the ruling of the Court in refusing to give the instructions as

requested, as he did also to the modifications appended to such as were given; and also to such as were given.

These several matters are opened by the assignments of error.

HARRIS, for the plaintiff in error, made these points—

1. Neither the collecting Bank, nor its notaries can establish a custom for giving notice different from that known to the law merchant. This must be personal when the party to be charged resides in the same town where the protest is made. [Stephenson v. Primrose, 8 Porter, 155; Foster v. McDonald, 3 Ala Rep. 34; Wilcox v. McNutt, 2 How. 776; Clay's Dig. 383, § 11, 12.]

2. If, however, such a custom is good it must have been established, or recognized by some formal act of the Bank. [Clay's Dig. 94; 7 Porter, 235.]

3. And even in such a case the custom should have been pleaded specially, and cannot be given in evidence under a general declaration. [1 Chitty Plead. 220–2; Jackson v. Henderson, 3 Leigh, 197.]

4. The rule of the Bank required notice to be given according to the law merchant, and therefore any other mode of notice was excluded.

5. The charges given were not authorized by the evidence, and were calculated to mislead the jury.

BALL, contra, insisted—

1. That the general law may be controlled or modified by custom or usage of a particular institution, especially when known and understood by the defendant. [Renner v. Bank of Columbia, 9 Wheat. 581; Mills v. Bank of U. S. 11 Wheat. 431; Bank of Wash. v. Triplett, 1 Pet. 30.]

2. A custom of a Bank brought home to a party dealing with it, enters into the essence of the contract, and becomes a constituent part it. [Fowler v. Bradly, 14 Pet. 318; Bank of Columbia v. McGruder, 6 H. & J. 180; 9 Mass. 155; Ib. 159; 12 Ib. 8; 10 Ib. 366; 17 Ib. 452; 3 Pick. 414; 1 Peters, 93; 1 H. & G. 231; 4 Wend. 484.] And the usage may be given in evidence as proof of the contract between the parties, as evidence of their assent. [11 Mass. 88; 4 Ib. 252; 6 Ib. 450;

5 Cranch, 52; 1 H. & G. 239; 3 Conn. 489; 6 H. & J. 172; 1 Peters, 170; 6 Cond. 440.]

3. The agent of the holder is only bound to give notice to his principal, and transmit him the requisite protests in order that he may give notice to those, he wishes to charge. If an agent undertakes to give notice, it will be good if given as early as it could have been given by the holder. [18 John. 230; 2 John. Ca. 1; 3 Ala. Rep. 34; 4 Ib. 148; 5 Conn. 698.]

4. The special custom may be proved under the averment of notice. [7 Porter, 175; 5 Cond. Rep. 698; 9 Porter, 300.] And when the facts are proved, the sufficiency of the notice is a question for the Court, and not for the jury. [3 Wend. 75; 11 John. 187; 1 Peters, 582.]

GOLDTHWAITE, J.—This case seems to have been contested by both parties, before the jury, under the impression that the notice of non-payment sent to the defendants, through the post office at Montgomery, by the notary, was insufficient, by the rules of the general law merchant, to charge them, and consequently, the attempt to support the suit by proving the custom and usage of the Bank at Montgomery, to give notice in this manner. In our judgment the notice sent in this manner was sufficient to charge them, independent of any special usage or custom, when the facts were disclosed that the Bank at Montgomery only held the bill for the purpose of collection, and that it was owned by a corporation located in another place. The law is now well settled that an agent holding a bill for collection, is not required to give notice directly to the parties to it, but his duty is immediately to notify his principal, he being a party to the bill, and the latter is entitled to charge the parties he looks to for payment, by sending them notice by the first mail after receiving information of the dishonor of the bill. [Colt v. Noble, 5 Mass. 167; Haynes v. Berks, 3 B. & P. 599; Turner v. Lague, 2 Johns. Cases, 1; Foster v. McDonald, 3 Ala. Rep. 34.] It is evident that a notice transmitted to the plaintiffs at Augusta, and by them returned to the defendants at Montgomery, would take more time for its conveyance, and involve more risk of miscarriage, than one deposited in the post office at Montgomery, addressed to the defendants there;

but the law merchant is not so unyielding in its nature as to require the performance of a useless act, or to refuse to adopt the act of the agent, if that is equally beneficial, and effectual, as action by the principal. It is true, that it has been laid down that the strict rule of the law merchant, when the parties reside in the same place, requires that the notice shall be personal, or left at the residence of the party sought to be charged, (Williams v. Bank of U. S., 2 Peters, 96; Ireland v. Kip. 10 John. 420;) and this was recognized in our own Court, in Stephenson v. Primrose, 8 Porter, 34; but the reason of it is, if indeed there is any one which is satisfactory, that the permission to send the notice by mail, is itself rather the exception than the rule, as personal notice must long have preceded the general establishment of the post. The charging a party, therefore, by notice sent by mail, was adopted to suit the general convenience of holders, who did not reside in the same place with the parties sought to be charged. We apprehend it entirely competent, for a holder of a bill payable in Montgomery, and himself residing elsewhere, to direct an agent to whom it is transmitted for collection, to give notice of the dishonor to any of the parties by mail, and that it is immaterial where they reside, so the notice has the proper direction.

We should have deemed it unnecessary to have said so much on this point of the case, if it had not apparently been twice before the Court in another case, though at neither time was it decided. In Foster v. McDonald, as reported in 3 Ala. Rep. 34, when a similar notice was given, and when the *prima facie* intendment was, that the parties resided in the same place, we conformed to the previous decision of Stephenson v. Primrose, but said if it should afterwards appear that from the residence of the holder at a distance from the place of payment, the notice of the dishonor of the bill could not have reached the defendant as soon as the informal notice actually given by the notary, it might be a question whether that was not sufficient. When the same case was again before the Court, in 5 Ala. Rep. 376, it appeared in the shape of a demurrer to evidence, and we held that the fair presumption was, that the notice was actually received by the defendant. It would have been equally proper perhaps, to have placed the decision upon the broader ground, that, whether received or not, the notice was in itself

sufficient. The head note prefixed to the report assumes more than was decided by the Court, and calls now for this correction, as otherwise it may have some tendency to mislead.

2. Although this point in the case is free from doubt, and would probably be decisive of the suit if sent back for another trial, yet the legal effect of the charge numbered five in the bill of exceptions, would remain for consideration. It is this, which has caused us to keep the case so long under advisement. At first, it seems a startling proposition, that a Bank has the capacity, by usage or custom, to establish a rule in opposition to the general law merchant; and we certainly are not prepared to yield our assent to the proposition thus broadly stated; but we must consider the refusal in its connection with the facts of the case, as before the jury. It possibly may, although the inference is otherwise, have been questioned whether the Bank at Montgomery was not the holder of the bill, as well at the time of suit brought, as at the time of its dishonor, and in that view the rule declared in Stephenson v. Primrose, that the parties residing in the same place, the notice should have been personal, or left at the defendant's place of business, would govern the case. To obviate the effect of this rule, proof was given of a usage of the Bank to give notice through the post office, and the question now is, whether it is competent for a Bank to establish such a rule, so as to bind the parties to a bill *payable at the particular Bank?* It must be borne in mind, that the question is not whether the Bank could dispense with notice altogether, but is merely as to the mode by which it shall be given. Notice to the indorsers, and drawer, is unquestionably a pre-requisite, in general, to charge them, and it is highly probable that no rule dispensing with it would affect a party, unless expressly assented to. But the mode of notice, is a matter which is in its nature subject to modification and change. Although the post is now generally recognized as a legal mode, there must have been a period in the history of commercial paper when that was unknown. So, too, the introduction of steam navigation between the old world and this, may have the tendency to introduce changes in the transmission of notices with respect to foreign bills: the same results may flow from the electro-magnetic telegraph. Is then the mode of giving notice, a fixed and unchangeable rule, incapable of modification,

without the consent of parties? We think this question must be answered in the negative, and other Courts have come to the same and similar conclusions, after the fullest consideration. In Renner v. The Bank of Columbia, 9 Wheat. 581, the question is very fully examined by the Supreme Court of the United States, and the decision was, that a Bank, by usage, could fix the fourth, instead of the third day of grace, as the period for demanding payment, preparatory to fixing the liability of an indorser. The Court assumed that days of grace were entirely the creation of custom and usage, and if the custom of a particular Bank was known to the party, it entered into and became a part of his contract. In the case of Mills v. Bank of the U. S. 11 Wheat. 431, the same Court carried the doctrine yet further, and held a party governed by the usage, although knowledge of it was not brought home to him, by reason of the bill appearing on its face to be made negotiable and payable at the particular Bank. That is this case, and instead of reasoning it out, from principles recognized and admitted almost universally, we shall content ourselves with a reference to these cases. We cannot perceive a distinction between a custom to vary the mode of giving notice, and one which varies the time for making a demand of payment. A great number of cases involving the same general principle, are collected in Cowan & Hill's notes, page 1412. We therefore conclude, that it was competent for the Bank at Montgomery, to establish a rule, that notice might be given to parties through the post office, although resident in the same place, and that such rule was obligatory upon the parties to all bills expressing upon their face to be payable at that Bank.

3. The prayer for the charge numbered six, in substance, asserts, that evidence of usage cannot be given in evidence under the common form of declaring, and that the count should contain an averment of the usage which distinguishes the case from the general law. The fact alledged is, that the defendants had notice, and that was as well established by showing that it was placed in the post office, as it would be by proof that it was left at their place of business. In either case, the conclusion is arrived at, by proof of a fact which leads to that result. The case of Jackson v. Henderson, 3 Leigh, 197, does not involve the same question as presented by this prayer. A distinction

may well exist, between evidence of presentment at a day different from that provided by the general law, and the evidence of notice. In the one case a different fact is proved, but in the other, the fact alledged is proved, but by different evidence. We think, therefore, there was no necessity to aver tne special custom.

This consideration of the case is sufficient for the decision of all the questions insisted upon here, and the result is an affirmance of the judgment.

AUSTILL & MARSHALL v. CRAWFORD.

1. A factor empowered to sell cotton, who converts the proceeds to his own use, is not precluded by the act of Congress from taking the benefit of its provisions as a bankrupt. The "fiduciary capacity" there spoken of, is a trust proper.
2. When in the absence of any special authority for that purpose, the cotton of a planter, is sold by his factor, in connection with that of others at a round price, the planter is entitled to the price it actually sold for, unless a usage of trade exists, authorizing sales to be so made, and the cotton of each planter to be scaled according to its relative value. Whether such a usage is valid—*Quere?*
3. Proof "that it was very common in the trade, but that a few factors in Mobile would not do so," is not proof of a usage of trade.
4. A factor having sold the cotton of his principal, contrary to instructions, and being directed to ship to Liverpool, concealed the fact of the sale from his principal, and procured other cottons of a similar quality, which he shipped in the name of his principal, to Liverpool where it was sold, and the net proceeds received by the planter: *Held*, that he was entitled to recover the difference between the price in Liverpool, and the price his cotton was actually sold at in Mobile.
5. When a factor disobeys instructions, he is responsible to his principal for the loss actually sustained thereby. When therefore a factor is directed not to sell unless he obtains a certain price, and he notwithstanding sells for a less price, the measure of damages is not the price thus affixed to the article by the principal, but the price at which it might have been sold during the season.
6. If a factor without instructions ships the cotton of his principal, he is responsible for any loss occasioned thereby, unless the principal on being informed of the shipment ratifies the act.

Error to the Circuit Court of Mobile.

Assumpsit by the defendant in error against the plaintiffs in error for the proceeds of one hundred and ninety bales of cotton, which the defendants as factors of the plaintiffs, had sold and not accounted for.

Plea by Austill, *puis darrien* continuance, that he had obtained his certificate of final discharge as a bankrupt.

Replication, that as to one hundred and thirty-one bags of the cotton mentioned in the declaration, the defendants sold the same and converted the money to their own use, refusing to account for it. That the residue was placed in their hands, upon condition that a specific price could be obtained for it—and that they sold the same and applied the proceeds to their own use.

To this replication the defendants demurred, and the Court overruled the demurrer. Issue was then taken on the replication by Austill, and Marshall pleaded *non assumpsit.*

Upon the trial the plaintiff proved that the defendants were his factors; that as such he consigned to them several lots of cotton, amounting in all to one hundred and ninety bales. He further proved the sale of one hundred and thirty-one bales on the 8th of December, 1838; that it was sold to a cotton broker in a lot of fourteen hundred and seventy-four bales at the aggregate price of thirteen cents for the whole lot, but it appeared that this lot was not worth more than twelve cents per pound. It was further proved, that it was very common in the trade for factors in making large sales of cotton of different persons, to sell the same at an aggregate price, and to apportion the price, or sum thus received, among the persons to whom the different crops belonged according to the relative value of each crop; but there were one or two factors in Mobile who would not do so.

On the 23d November, 1838, the plaintiff wrote to the defendants, informing them that he had shipped one hundred and thirty bales of cotton to them, and requested to be informed as soon as the cotton was sold. On the 11th of December of the same year, he again wrote to them expressing his opinion, that the crop would be short, and instructing them, if fourteen cents per pound could not be obtained for the cotton on hand, to retain it until his arrival in Mobile.

It was further in proof, that between the 12th and 13th December, the defendants employed a cotton broker and furnished him with samples, which the proof conduced to show were the samples of the plaintiff's cotton, with instructions to the broker to purchase a like amount of cotton for them; who purchased a like amount of the same quality at twelve cents per pound; which cotton the defendants afterwards shipped for the plaintiff to Liverpool, amounting in all to one hundred and ninety bags, through the Branch Bank at Mobile; the Bank advancing on the same, and taking a bill of exchange from the plaintiff against loss or deficit; and there was proof that the cotton did not sell for sufficient to pay the bill. It was proved that a part of plaintiff's cotton, not included in this suit, was sold in April, 1839, by defendants as his factors for fourteen cents per pound, and it did not appear that the plaintiff knew of the substitution of the cotton when he directed the shipment.

The defendant introduced in evidence the certificate of his final discharge as a bankrupt.

The defendant's counsel moved for the following charges:—

1. That under the facts of the case if there was any thing due from the defendants it was not a fiduciary debt, within the meaning of the bankrupt act.

2. That a debt due by a factor for a breach of duty is not a debt due in a fiduciary character, and that there can be no recovery in this case against Austill.

3. That the measure of damages in this case, is the actual loss in money sustained by the substitution of the cotton.

4. That if the cotton substituted was as valuable as that of the plaintiff, which was sold, and in consequence no loss has been sustained, the plaintiff is not entitled to recover any thing.

5. That it lay with the plaintiff to prove the pecuniary damage he had sustained, and if none is proven, however irregular, or fraudulent, the conduct of the defendants may appear, he is not entitled to recover.

6. That the measure of damages in this case is not the difference between the value of the cotton at the time it was sold by the defendants, and that which it was sold for in Liverpool. But if the cotton shipped, sold in Liverpool for as much as

the plaintiff's cotton would have sold for, and the plaintiff, if his cotton had not been sold here, would have shipped it to Liverpool, then he has sustained no damage.

7. That the plaintiff, having shipped the substituted cotton, is not entitled to recover its value at the time of shipment, unless the jury believe that the plaintiff, if his own cotton had not been sold, would have retained it here, and sold it at the time. That the defendants are entitled to credit for the net proceeds of the cotton sold in Liverpool, and that the plaintiff is not entitled to recover any thing without accounting for the sum he has received from the sale in Liverpool. These charges as asked the Court refused to give, and charged the jury that a cotton factor, is the agent of the planter who ships cotton to him, and the money when received by the factor belongs to the planter, and is a fiduciary debt. That the defendants were bound to disclose to the plaintiff the fact of the sale of the cotton—that the defendants had no right to substitute other cotton for the plaintiff's, without his knowledge or consent—that doing so without disclosure was a fraud on the plaintiff, and that the measure of damages was the price for which the one hundred and thirty-one bales were sold in Mobile. That the residue on hand at the receipt of the letter of the 11th December, which was limited at fourteen cents per pound, the defendants had no right to sell for a less price, or to ship without the consent of the plaintiff, and if he did so he was liable for the price as limited, subject to a reduction of so much as the plaintiff had received on the shipment to Liverpool. That the plaintiff had the right to repudiate the shipment, as soon as he ascertained that the cotton was not his own. To all which the defendants excepted, and judgment being rendered against them, they now assign for error.

Dargan, for the plaintiff in error, cited 2 Howard, 202, to show that the Court erred in its judgment on the demurrer to the replication, and also in its charge to the jury that the debt was of a fiduciary character.

It was uncertain from the proof whether all the cotton was sold in Mobile, or only one hundred and thirty-one bales; it was also uncertain whether the cotton was shipped with, or without the consent of the plaintiff; but the fair inference

was, that he consented to it, yet, the charge of the Court took from the jury the consideration of the question of fact.

The facts of the case do not warrant the inference of fraud. The concealment, it is fair to presume, was from a wish not to offend the plaintiff, who probably desired to risk the foreign market, and if the substituted cotton was as good as his own, he sustained no injury by the concealment of the fact of the sale.

The Court clearly erred in telling the jury that the planter could set his own price on the cotton, and that was the measure of damages. The true measure of damages was the actual injury sustained by the omission to obey the instructions. This charge the Court refused to give. [Story on Agency, 216, 17, 18.]

Campbell, contra. The law of this State must ascertain the relation of factors and their principals. They may establish those relations as technically "fiduciary," and place them on the same footing as executors and guardians. This appears to be done by our statute. [Clay's Dig. 483–4.]

But if the Court erred in its judgment on this point, it will not disturb the judgment against Marshall. The severance of the defences, severed the contract. The case ceased to be joint. [11 Peters, 86, 96.] The plaintiff might either before, or after judgment, enter a *nolle prosequi*, or discontinue his action against one without affecting the other. [1 Peters, 46; 16 Id. 303.] And an appellant Court will, after a reversal, authorize the party to take the same course. [3 Ala. Rep. 712; Kirby's Rep. 119; 6 S. & R. 412; 8 John. 435; 11 Mass. 379–206; 13 Id. 221.]

There can be no question as to the charge of the Court, that the planter may recover the price for which his cotton was actually sold. As to the charge upon the limit fixed as the price, the factor is bound to obey the instruction of his principal; if he disregards them, as the planter has no means of proving the value of his cotton, the price fixed by the planter should be *prima facie* the rule of damages, and it devolves on the factor to diminish the damages by proving its actual value. [1 Cowan, 645; 1 Brock. 103; 3 John. 185; 12 Wend. 362; 4 Cranch, 150; 6 Vesey, 496; 6 Taunt. 344.]

ORMOND, J.—The first section of the bankrupt law declares, that its provisions shall not extend to one whose debt has been created "as an executor, administrator, guardian, or trustee, or while acting in any other fiduciary capacity." It is in this case insisted, that a factor who commits a breach of his duty, by selling and retaining the proceeds of cotton intrusted to him to sell, is embraced by the act, and prohibited from taking advantage of its provisions. We are clearly of the opinion that this case does not come within the interdict of the statute. The "fiduciary capacity" spoken of in the law, is a trust proper; otherwise every agent who had violated his authority, would be excluded from the benefit of the act. To this point the case of Chapman v. Forsyth, 2 Howard, 202, is a full authority.

It is, however, supposed that the act of the Legislature of this State, which makes it penal for clerks of steamboats, factors, &c. to sell, negotiate, transfer, or pledge money, or chattels, intrusted to them for safe-keeping, or for any special purpose, without authority to sell or transfer the same, contrary to good faith, &c. shows this to be a breach of trust, and therefore excluded from the benefit of the bankrupt law. The offence punished by this statute, does not appear to be the same as the case made by the replication to the plea, because the factor, in this case, had authority to sell. Independent of this consideration, we suppose it to be clear, that the construction of the bankrupt law must be the same all over the United States, and cannot be varied in each State of the Union by the local law. To understand the use of terms employed in it, giving or excluding its benefits, resort must be had to their meaning in the common law, and not in the local law of the State where the bankrupt may happen to be domiciled. The demurrer to the replication was therefore improperly overruled.

The questions presented on the bill of exceptions, involve the consideration of the relative rights of principal and agent. It is the duty of an agent, limited by instructions, to adhere faithfully to them, and if he departs from them, he becomes responsible to his principal for the injury actually sustained in consequence of such departure. Whether he may not, in any case, exceed his instructions without risk, need not be now discussed—the general rule certainly is, that he must adhere lite-

rally to them, at his peril. [Paley on Agency, 7, 68; Leverick v. Meigs, 1 Cowen, 659; Liotard v. Graves, 3 Caines, 238; Mallough v. Barber, 3 Camp. 150; Short v Skipwith, 1 Brock. 103.]

It follows, necessarily, that when a factor sells the goods of his principal, it becomes his duty to disclose to him in a reasonable time. the fact of such sale; and that he cannot, without a breach of faith, employ the money of his principal in trade, but should hold it subject to his order. When, therefore, the sale of the cotton was made, in this case, the money belonged to the principal, and it was a breach of duty in the factor, not to disclose this fact to his principal, when directed by him to ship his cotton to Liverpool. The argument, that the planter has sustained no injury, if he intended to ship his cotton, is unsound. It cannot now be known, whether he would have desired his cotton to be shipped to Liverpool, if the fact of the sale had been disclosed to him; and the Court correctly refused the instruction moved for on this point, not only for this reason, but because it was purely abstract.

If the cotton was shipped without instructions, the factor was responsible for any loss sustained thereby, unless the principal, after being informed of the fact, ratified the act. His instructions were to sell the cotton for the best price he could get in the home market, and did not authorize him, to expose the planter, to the hazards, or the fluctuations of the foreign market.

It appears in this case, that the cotton of the plaintiff was sold, with that of many others, in a large lot, at the price of thirteen cents per pound—the relative, or average value of that of the plaintiff, when compared with the whole lot, being twelve cents per pound. It was proved "that it was very common in the trade, for factors, in making large sales of cotton of different persons, to sell the same at an aggregate price, and to apportion the price, or sum received, among the persons to whom the different crops belonged, according to the relative value of each crop; but there were one or two factors in Mobile who would not do so." The usage of trade, may doubtless be relied on by the factor, to show that he has been in no default, as every one transmitting produce to him for sale, must expect that it will be disposed of in the ordinary course of trade;

unless by instructions to the factor, he expressly limits the mode and manner of selling.

Whether a usage which authorized the factor, or the broker through whom the sale was made, to determine that a particular lot of cotton was worth less than it actually sold for, in connection with other separate lots, we need not now determine, because we think no such usage is proved so as to be binding on the planter. The language of the bill of exceptions is, "that it was very common in the trade, but that a few factors in Mobile would not do so." This is certainly not proof of a usage of trade, and there being no authority shown for reducing the price, the plaintiff was entitled to the price his cotton actually sold for.

The cotton substituted for that of the plaintiff, being without his consent, was at the risk of the factors, and the plaintiff had the right to a recovery for the difference, between the amount his cotton was actually sold for in Mobile, and the net proceeds of the sale of the substituted cotton in Liverpool, which it appears he received.

The factor being bound to adhere literally to the instructions of his principal, if he violates them is liable for the injury actually sustained by the principal, in consequence of the violation. In this case it appears, that the principal limited the sale of his cotton to fourteen cents per pound; but a disregard of this instruction would not necessarily impose a liability on the factor, to pay the difference between that price, and the price at which it was sold, if sold for less. The actual injury would be, the price at which it might have been sold during the season, to be ascertained by the price at which cottons of that quality were actually sold for. [Webster v. DeTastet, 7 Term Rep. 157; Short v. Skipwith, 1 Brock. 103.]

The Court charged the jury that if the factors sold the cotton limited at fourteen cents per pound, at a less price, or shipped it without the consent of the owner, they were liable for the price *as limited.* This, from the law as above laid down, was erroneous. It is true, it appears to have been proved, that these factors sold other cotton of the plaintiff, during the same season, (in April, 1839,) for fourteen cents per pound, and this might have authorized the jury, in taking that as the value of such cotton during that season. But the charge of the Court

took that power from the jury, by instructing them, that they must give the plaintiff the price he had himself affixed to his cotton, instead of giving him the price his cotton might have sold for during the season, if his instructions had been obeyed. Upon this part of the case, the case referred to from 1 Brock. 103, is expressly in point. See also Story on Agency.

This view of the case renders it unnecessary to consider, whether this Court could not render a judgment here against Marshall alone. Let the judgment be reversed, and the cause remanded for further proceedings.

WARING v. MORSE.

1. Where the carrier of goods by water, stows them on deck without the consent of the shipper, and in the absence of any custom (binding on the latter) thus to stow them, he will be responsible for their loss, if they are "washed overboard in a gale;" and if a part of the goods shipped are thus lost, the shipper will be entitled to *recoupe* to the extent of their value, for the freight of the goods delivered.

Writ of Error to the County Court of Mobile.

This was a suit commenced before a justice of the peace, by the defendant in error, for the recovery of a sum less than fifty dollars, and removed by appeal to the County Court, where a verdict was returned for the plaintiff; and judgment rendered accordingly. On the trial certain questions of law were reserved, which are duly certified by the bill of exceptions. It appears that the defendant below, on the 16th March, 1844, shipped upon a schooner at New Orleans, sundry articles of merchandise, among which were four barrels of whiskey, all in good order and well conditioned, and, by a bill of lading, undertaken to be delivered in like good order at Mobile, (the dangers of the seas and rivers only excepted,) to the defendant or his assigns, he or they "paying freight for the said goods, twenty-four 60-100 dollars for the lot."

The plaintiff being examined in his own behalf, testified, that he stowed the four barrels of whiskey on the deck, and that they were washed overboard in a gale of wind; that the deck was entirely covered with barrels, all of which were well secured. A clerk of the defendant was introduced as a witness for the defendant, who stated that, after the arrival at Mobile, he went on board the schooner, and the master of it informed him, that he had been in a gale and lost four barrels of the freight mentioned in the bill of lading. Plaintiff also said, that he believed his vessel was overladen, and he had so informed persons in New Orleans, who induced him to take more freight than he ought to have carried. The barrels of whiskey were of the value of forty dollars.

The defendant prayed the Court to charge the jury as follows: That to entitle the plaintiff to recover, it was necessary for him to have delivered all the goods mentioned in the bill of lading; or, that under the contract evidenced thereby, he could not recover freight for those delivered; especially, if, by his own neglect, goods of greater value than the amount of it had been lost. *Further*, that the fact that the amount of freight on the goods lost, were not ascertainable under the contract, will not entitle the plaintiff to recover freight for what were delivered, if the goods lost, were worth more than the sum sought to be recovered. That in the absence of proof showing the amount of the freight carried, the jury could not apportion the same. *Lastly*, if the vessel was overladen, or the goods stowed on the deck, the plaintiff could not recover under the contract evidenced by the bill of lading. Which several instructions the Court refused to give, and charged the jury that the plaintiff was entitled to recover freight for the goods delivered, the amount of which the jury would ascertain from the bill of lading and other evidence before them. *Further*, that the damages sustained by the defendant, in consequence of the loss of the whiskey, could not be set-off against the plaintiff's demand for freight.

Stewart, for the plaintiff in error, insisted, that the failure to deliver the four barrels of whiskey, which were of greater value than the freight upon all the merchandise shipped on the plaintiff's vessel, was a bar to the demand sought to be recovered. The shipment on deck was in itself such an act of care-

lessness, or disregard of the plaintiff's undertaking, as to make him liable for the loss, no matter how it occurred. [Post & Russell v. Robertson, 1 Johns. Rep. 24; Scott v. Libby, et al. 2 Johns. Rep. 236; Welsh v. Hicks, 6 Cow. Rep. 504; Coffin v. Storer, 5 Mass. Rep. 252.]

No counsel appeared for the defendant.

COLLIER, C. J.—The personal obligation to pay freight rests either on the charter party, or on the bill of lading, by which the payment of freight is made a condition of delivery; and the general rule is, that the conveyance and delivery of the goods is necessary to entitle the carrier to freight. [3 Kent's Com. 219; Frith v. Barker, 2 Johns. Rep. 327; Palmer, et al. v. Lorrillaird, et al. 16 Johns. Rep. 348; Andrew v. Morehouse, 5 Taunt. Rep. 435; Gibson v. Mender, 2 B. & A. Rep. 17; Bradhurst v. Col. Ins. Com. 9 Johns. Rep. 17.] In the present case, the agreement as shown by the bill of lading obliges the plaintiff to deliver to the defendant or his order in Mobile, the merchandise designated in it, and the latter in consideration of such delivery, stipulates to pay a gross sum for freight. Now it might admit of question, whether it was not incumbent upon the plaintiff to deliver all the goods, before he could require the payment of the freight. [Vance, et al. v. Clark, et al. 1 Miller's La. Rep. 324.] Yet we are inclined to think, that the receipt of a part authorizes an apportionment and recovery *pro rata*. Upon this hypothesis we will consider the case.

That the defendant may resist the recovery of freight upon the ground of inexcusable loss of a part of his goods, seems to us to be a plain proposition. The principles of maritime law are exceedingly liberal, and controlled by an enlarged equity; the strict rules which govern sets off at law, would not be allowed to operate upon contracts within its influence, when these rules operate injustice. Where there is a state of things growing out of, or resulting from a contract of affreightment, showing that the shipper has been injured by the carrier to an amount equal to the freight, the latter cannot be permitted to recover. This conclusion is supported, not only by the equitable principles to which we have referred, but also by the legal right to recoupe the damages.

The only remaining inquiry is, does it appear that the four

barrels of whiskey were lost under such circumstances as makes the plaintiff liable to pay for them. In Barber v. Bruce, 3 Conn. Rep. 9, it was decided that where goods were placed on deck without the consent of the owner, and are in consequence thrown overboard in tempestuous weather, in the absence of a custom thus to stow them, which was binding on the shipper, the carrier was responsible for the loss. [See also Smith, et al. v. Wright, 1 Caine's Rep. 43; Lenox v. United Ins. Com. 3 Johns. Cases, 178.] These citations we think correctly lay down the law, and it follows, from the proof in the record, that the plaintiff is liable for the loss. The consequence is, that the judgment of the County Court is reversed, and the cause remanded.

RHODES' ADMINISTRATORS v. STORR.

1. When notes are given by a purchaser for the price of land, agreed to be sold by verbal contract only, their payment cannot be avoided, on the ground that the contract is void by the statute of frauds. It is an executed contract so far as the purchaser is concerned, and if the vendor is willing and able to perform the verbal contract, the notes cannot be for this cause avoided.

Writ of error to the Circuit Court of Butler.

Assumpsit by Rhodes against Storr, on a promissory note made by the latter to one Skanes and by him indorsed to Rhodes. The defendant pleaded, 1. Non-assumpsit. 2. Fraud. 3. The statute of frauds and perjuries. 4. That the promissory note was given on, and in consideration of, a parol contract for land. These pleas are said to be pleaded in short, by consent, and a demurrer is interposed in the same manner. What judgment, if any, was given on this demurrer, does not appear. The cause was tried before a jury, and there was a verdict for the defendant, upon which judgment was given. At the trial,

the plaintiffs produced the note and rested. The defendant then put in evidence, tending to show that the note was given in consideration, and for the price, of certain land sold to him by Skanes; the contract of sale was not in writing, but was verbal only. The plaintiffs then produced evidence tending to show that the sale was made in 1839; that on the premises there was a grist mill, the use of which was of considerable value; that the defendant entered into the possession of the premises, under the contract of sale, and remained therein until August, 1843, without any hinderance, or disturbance from the vendor, or any other person. After the commencement of the suit, the vendor and the defendant together, went to a justice of the peace to have a deed drawn and executed, according to the contract: the deed was drawn at the request of the parties, and in accordance with their mutual direction; the vendor offered to sign and seal it, but the defendant refused to accept it, for the reason that one of the necessary title papers, (a deed from a former owner,) was not produced; the defendant then offered to rescind the trade and abandon the possession. It was also in proof, that the defendant had paid the vendor about seven hundred dollars of the purchase price, and that the government patents were by him long since delivered to the defendant, by whom they were then returned; that the defendant, at the time of his rescission, required the vendor to produce a certain deed to a portion of the premises, which deed was then lost and could not be produced. There was proof also, tending to show, that the vendor had a good title, and long before had offered to make title to the defendant, who requested him not to do so at that time, because he had a lawsuit, pending against him, in which, if judgment passed, he never intended to pay, and therefore did not desire the title to be delivered to him. There was no proof that the defendant offered to pay any thing for the use of the premises.

On this state of proof, the plaintiffs requested the Court to charge, that, if they found the proof as before stated, they were entitled to recover. This was refused, and the jury was instructed that the contract was void, within the statute of frauds, and they ought to find accordingly, if they should determine the facts to be true; and that the note was given on a sale of land, for which there was no note or memorandum in writing,

signed by the parties, to the sale. The plaintiffs excepted, and this charge is assigned as error, as is also the matter that the demurrers to the pleas were overruled, if such is the intendment to be drawn from the record.

Cook and F. J. Judge, for the plaintiff in error, cited Cullum v. The Bank, 4 Ala. Rep. 21; Cope v. Williams, Ib. 362; Meredith v. Naish, 3 Stewart, 207.

G. W. Gayle and Watts, contra, cited Allen v. Barker, 2 Stewart, 21; Johnson v. Hanson, 6 Ala. Rep. 351; Cummings' heirs v. Gill's heirs, Ib. 562.

GOLDTHWAITE, J.—On the facts presented by the bill of exceptions, this case is, in principle, essentially the same as Cope v. Williams, 4 Ala. Rep. 362. Indeed the only distinction between them is, that there the defendant had possession of the lands, when here it was abandoned pending the suit. The statute of frauds, however, has no bearing on this case, as the action is not upon any contract in relation to the sale of lands. The contracts which the statute operates on, are those which are unexecuted, and in which the action has to be on the contract itself. Such was the case of Johnson v. Hanson, 6 Ala. Rep. 351, where the action was to recover a portion of the money due on the contract, which, being evidenced by no note in writing, we held that the plaintiff was not entitled to recover. Similar to this, would have been Meredith v. Naish, 3 Stewart, 207, if the facts disclosed had not withdrawn it from the influence of the statute. Here the contract is executed, so far as the purchaser is concerned, by his having given his notes for the price agreed on. It is true, the contract is unexecuted on the part of the vendor, but this does not affect the other party, nor authorize him to avoid the notes he has given, because he has omitted to bind the vendor. If, when called on, according to the express, or implied terms of the contract, to execute the necessary titles, the vendor had refused, the notes might, probably, have been avoided, in consequence of the failure of the consideration for which they were given; but there is no pretence to avoid them, so long as the vendor was willing, and able, to perform every thing which, in good conscience, he was bound to do.

Judgment reversed and the cause remanded.

WHEAT v. CROOM.

1. Where one is charged with the commission of a trespass upon a slave, in such a manner as to require a denial, or refutation, which the party accused refuses to do, but requires proof of the fact, it is in law an admission of the truth of the charge.
2. In the case of a battery of a slave, the jury may give vindictive damages, and are not confined to the actual loss sustained by the master.

Error to the County Court of Sumter.

TRESPASS, *vi et armis*, by the defendant against the plaintiff in error, for an assault and battery on a slave, the property of the plaintiff.

Upon the trial, the plaintiff introduced a witness, who proved that he, the witness, had accused the defendant in the presence of the plaintiff, of the commission of the trespass, and that the defendant did not deny it, but replied: "If I whipped the negro, you prove it—I shall not tell you any thing to commit myself." Whereupon the Court charged the jury, that when a man is charged with the commission of a trespass of this character, in the presence of the owner of a slave, and did not promptly deny it, it was presumptive evidence that he was guilty of the charge. Also, that the jury were not to measure the damages by the value of the slave, but might give smart money. To all which the defendant excepted, and which he now assigns for error.

INGE, for plaintiff in error, cited 1 Stewart, 145; 3 S. & P. 329.

GREENE, contra.

ORMOND, J.—In Watson v. Byers, 6 Ala. 393, we held, "that if one asserted in the presence and hearing of another, in such a manner, as to entitle him to an answer, that he was indebted to him in a certain amount, his silence, would, in law, be an admission, that the claim asserted was just." This rule of evidence rests upon that universal principle of human

conduct, which leads us to repel an unfounded imputation, or claim; and will, in most cases, be as satisfactory testimony upon which to found a verdict, as a direct admission. It will be observed, that the rule is qualified in the above quotation; that the question, or assertion, should be such, as was entitled to an answer, or a refutation. A rude demand, or offensive imputation, might be treated with silent contempt. For authorities on this point, see Batturs v. Sellers, 5 H. & J. 119; Vincent v. Huff, 8 S. & K.; Jackson v. Winchester, 2 Yeates, 529.

We can perceive no reason why this principle should not apply to the present case. The accusation was direct, and appears to have been made in such a way as to demand an answer; the party declined committing himself, and required proof of the fact; and we think the Court did not err, in telling the jury, this was presumptive evidence, that he was guilty of the charge. That this rule applies to such a case as the present, as well as to mere money demands, see State v. Perkins, 3 Hawks. 377.

The measure of damages was not the actual injury sustained by the master in the loss of the service of the slave, but it was competent for the jury to give vindictive damages, or as it is called, smart money. This would be the law, if the injury had been inflicted on a mere chattel—if it had been the horse of the plaintiff, instead of his slave. [Tillotson v. Cheatham, 3 Johns. 56; Woert v. Jenkins, 14, Id. 352.] The slave, although property, is also a moral agent, a sentient being. As such, he is capable of mental, as well as corporal suffering, and for this, as well as for the evil example, vindictive damages, may be given. The master is his natural, as well as legal protector, and may recover for an injury to the slave, considered either as a person or as property, unless the injury is merged in the criminal offence.

Let the judgment be affirmed.

BANCROFT, ADM'R, &c. ET AL. v. STANTON, JR.

1. Where in a cause removed by appeal from a justice of the peace, the judgment of the County Court recited, that the parties came by their attorneys, and thereupon came a jury, &c., who returned a verdict for the plaintiff, the absence of the statement of the cause of action, a plea and issue, furnish no ground for the reversal of the judgment.
2. Where a contract in writing professes to be sealed by the obligors, although they have omitted to affix their seals, yet by the act of 1839, it will be held to be a sealed instrument.
3. If an appeal bond recites the time when a judgment was rendered, its amount, &c., that the defendant had prayed an appeal to the "*next County Court*," is itself dated, and in other respects conformable to the statute, it will be sufficient, though the time when the Court sits is not stated.
4. A judgment *nunc pro tunc* may be rendered against the surety in an appeal bond, at a term subsequent to that at which a recovery was had against the appellant; and the judgment against the appellant, together with the appeal bond, will be sufficient to authorize such a judgment against the surety.
5. A judgment was rendered against the appellant, (who was administrator,) *de bonis intestatis;* at a subsequent term a judgment was rendered against his surety for the appeal, and execution directed against both: *Held*, that the entries only authorized one execution, *de bonis intestatis* as to the principal, and *de bonis propriis, &c.*, as to the surety; that if the judgment as to the surety was erroneous, the error was at most a mere clerical misprision, amendable in this Court, under the statute, at the cost of the plaintiffs in error.
6. As a general rule, it is not allowable to join in the same action an administrator with one chargeable on his own account, but this rule has never been applied, so as to prevent the rendition of a judgment under the statute, against an appellant and his surety, though the former was an executor or administrator.
7. Where an administrator who is made a defendant, *pendente lite*, does not claim a continuance, but goes to trial, and a verdict and judgment are rendered against him, he cannot object on error, that the cause was tried within six months after the grant of administration.
8. After verdict and judgment, it is not competent for a party to object on error, that the notice by which he was brought into Court, or the orders of continuance previous to trial, were irregular.

Writ of error to the County Court of Mobile.

THIS cause originated before a justice of the peace at the instance of the defendant in error, to recover, as the summons recites, of Henry W. Horn, "a debt, or other demand, not exceeding fifty dollars." We find in the transcript a paper purporting to be an appeal bond, subscribed by Horn and Hugh McCaw, but without any scrawl or other substitute for a seal. This writing is dated on the 20th September, 1843, and recites in the condition, that Horn had prayed, and obtained, an appeal to the County Court of Mobile, at the admiralty term of 1843, from a judgment rendered on the 16th September, of that year, for thirty-one 25-100 dollars, debt, besides costs of suit. The transcript shows that the cause was continued, in July, 1843, for want of notice of the appeal; in November, the defendant's death was suggested; on fourth December again continued, and on the 22d of the same month, a *scire facias* was directed to issue to Bancroft, his administrator. A paper purporting to be a *scire facias*, was issued, and served on Bancroft, on the 11th January, 1844, returnable on the third Monday of that month; and upon its return, Bancroft, as administrator, was made a defendant, and the cause continued. An entry then appears, dated the 5th of February, 1844, reciting that the Court met pursuant to law; then follows a judgment, which states that the parties came, by their attorneys, and also, came a jury, &c, who assess the plaintiff's damages to thirty-two 50-100 dollars. It is considered, by the Court, that the plaintiff recover, &c., to be levied *de bonis intestatis*.

After several continuances of a motion, so to amend the judgment as to render it *nunc pro tunc* against Hugh McCaw, as the security for the appeal, on the 6th of May the motion was granted, and a judgment then rendered against him, as of the fifth of February, 1844, for the same amount as the judgment against the administrator.

On the 6th of May, a motion was made, and continued, to set aside the judgment, on the ground of surprise, and because it was rendered against Bancroft before the expiration of six months from the time of his appointment as administrator. On the 20th of the same month, the motion was denied, and execution directed to issue against both Bancroft and McCaw, who now join in a writ of error.

G. N. STEWART, for the plaintiffs in error, made the following points: 1. There was no issue for the jury to try, and there is nothing in the record to sustain the judgment against Bancroft. 2. The writing intended for the appeal bond has no seal, and the condition, when taken in reference to the date, is contradictory. 3. Notice was not given to McCaw of the judgment *nunc pro tunc*, and there is nothing in the record to warrant such a judgment. 4. The judgments against the plaintiffs in error are several, yet in the order denying the motion to set them aside, an execution is awarded against them jointly. 5. There could be no judgment against Bancroft and McCaw jointly; consequently the entry *nunc pro tunc*, against the latter, was irregular. 6. That the judgment against Bancroft was rendered in les than six months after he was appointed administrator.

No counsel appeared for the defendant.

COLLIER, C. J.—In Castleberry v. Pearce, 2 Stewt. & P. Rep. 141, the defendant moved in arrest of judgment, that although the jury had returned a verdict, the record did not show that an issue had been joined, or any plea interposed by the defendant. This Court held, that, as the judgment recited that the jury were sworn to try an issue, they would intend that the pleadings had been regularly made up, and lost from the papers, as the opposite conclusion would falsify the record. In Wheeler, et al. v. Bullard, 6 Porter's Rep. 352, we determined, that after verdict upon an issue tried, or judgment, or plea, withdrawn, the defendant could not, on error, insist upon the want of a declaration, but it would be presumed that a declaration was dispensed with by the parties, or that it was lost after judgment. [See Benson v. Campbell, 6 Porter's Rep. 455; Napper v. Noland, 9 Id. 218; Price, et al. v. Chevers, Id. 511; Elliott v. Smith & Co., use, &c., 1 Ala. Rep. 74; Ware v. Todd, Id. 199.]

So where the judgment recited, that the parties came by their attorneys, "and thereupon came a jury, &c., who, on their oaths, do say," &c. it will be inferred, either that a proper issue was tried, or the plea was waived, although none appeared in the record. [Lucas v. Hitchcock, 2 Ala. Rep. 287.] To the

same effect are Clark's Adm'rs v. Stoddard, Miller & Co. 3 Ala. Rep. 366; Bethea v. McCall, Id. 449.

In the present case, the judgment recites the appearance of the parties by their attorneys, and the submission of the cause to a jury, who found a verdict for a definite sum in damages. In this condition of the record, the cases cited show that the absence of a statement of the plaintiff's cause of action, a plea and issue, furnish no ground for the reversal of the judgment.

By the act of 1839, it is declared, that "All covenants, conveyances, and all contracts in writing, which import on their face to be under seal, shall be taken, deemed, and held, to be sealed instruments, and shall have the same effect as if the seal of the party, or parties, were affixed thereto, whether there be a scrawl to the name of such party, or parties, or not." [Clay's Dig. 158, § 41.] The writing intended as an appeal bond, professes to be sealed with the seals of the appellant and his surety, and, being a contract in writing, must, according to the act cited, be regarded as a bond. It is dated the 20th of September, 1843, recites that the judgment was rendered on the 16th of the same month, in favor of the plaintiff, its amount, &c., and that the intestate had appealed to the next County Court, in Mobile county, at the admiralty term, 1843. There is a statute which requires appeals from justices of the peace, in that county, to be made to the terms for the trial of admiralty cases, (as they are called,) and although there are more terms than one holden in the year, yet the recital that the appeal is to the "next" Court, is sufficiently definite to indicate when it is to be returned. The condition of the bond, is in terms, equivalent to those prescribed by the statute, which requires it to be executed, as a condition on which the appeal is allowed. [Clay's Dig. 314, § 9; see, also, *Ex parte* Weissinger and Crook, at this term.]

In Brown v. Bartlett, 2 Ala, Rep. 29, it was held that an amendment of a judgment might be made at a term subsequent to its rendition, if there is evidence of record to authorize it. And in a previous decision, where a judgment had been rendered in blank, as to the amount, an amendment was permitted after the lapse of seven years. [Wilkerson v. Goldthwaite, 1 Stewt. & P. Rep. 159.] So in Allen and Dean v. Bradford and Shotwell, 3 Ala. Rep. 281, it was determined

that a judgment may be amended *nunc pro tunc*, although no execution has issued on the original judgment, within a year and a day from its rendition. *Further*, that a judgment *nunc pro tunc*, may be entered without notice to the opposite party. [See, also, Fuqua and Hewitt v. Carriel and Martin, Minor's Rep. 170; Clemens v. Judson and Banks, Id. 395; Thompson v. Miller, 2 Stewart's Rep. 470; Draughan and others v. The Tombeckbee Bank, 1 Stewart's Rep. 66; Mays, et al. v. Hassell, Adm'r, 4 Stewt. & P. Rep. 222.]

In the case at bar, the verdict and judgment against Bancroft, were sufficient evidence to authorize the County Court to render judgment against the surety in the appeal bond. The liability of the latter, was a consequence of the judgment against the administrator of his principal, and this judgment, together with the bond, was all that can be required to sustain the action of the Court below. If the bond was a forgery, it is possible that Court could arrest proceedings on the judgment; but be this as it may, the surety would not be remediless.

The judgment against McCaw, is certainly not very technical, yet it clearly shows, when taken in connection with the order made to set aside the judgment, both as to Bancroft and himself, that the Court intended to make them both liable to pay the amount of the verdict and costs; the one *de bonis intestatis*, the other *de bonis propriis*, &c. This, though informally, is, substantially, expressed by the order for the execution, acting upon the previous entries. The intention being apparent, if the execution had issued against the plaintiffs in error, separately, all injury might have been prevented by a *supersedeas;* and if there be an error in the entries as to the surety, it is at most a mere clerical misprision, amendable under the statute, at the cost of the plaintiffs in error. [Dearing, Sink & Co. v. Smith & Wright, 4 Ala. Rep. 432.]

It may be stated generally, that it is not allowable to join in the same action, an executor, or administrator, with one chargeable on his own account. But this rule, has never been applied to a case like the present. Here the surety is not joined with the administrator, but his liability is consequential, depending upon the fact, whether his principal is successful in the prosecution of the appeal; if he fails, the terms of the bond fix

the liability of the surety, and the statute declares that judgment shall be rendered against both of them, and execution issue against both, or either of them. [Clay's Dig. 315, § 11.] The fact that the appellant died, pending the appeal, and his administrator was made a party in his stead, cannot make a different rule applicable.

Bancroft cannot be heard to alledge that a judgment was rendered against him within six months after he became administrator. By submitting to a trial by jury, he waived the right to continue, and he cannot now set aside the judgment, that he may avail himself of it. [Farley's Adm'r v. Nelson, 4 Ala. Rep. 183.] The order for a notice to the appellee, being dated previous to the removal of the cause to the County Court, can't affect the judgment of the Court; if necessary we would intend that the date was incorrectly stated. It may be said, however, both in respect to this and the other orders, previous to the trial, that they were all cured by the appearance of the defendant, and the verdict and judgment.

Our conclusion, from a view of all the points presented, is, that the judgment must be affirmed.

McCARY, ET. AL. v. MABE.

1. Where a bankrupt is sued before a justice of the peace, and omits there to plead his discharge, he may, notwithstanding, insist upon it as a defence, when the case is appealed by him to the Circuit Court.

Writ of error to the Circuit Court of Greene.

Suit commenced by Mabe against McCary, in Justices Court, where the plaintiff had judgment, and from which the defendant appealed to the Circuit Court, giving White as his surety on the appeal bond.

In the Circuit Court, Mabe filed a statement, alledging the indebtedness to him by McCary for nine dollars. McCary pleaded his discharge as a bankrupt previous to the commencement of the suit in the Justice's Court. Mabe replied, that this defence was not interposed before the justice of the peace. The defendant demurred; the Court sustained the demurrer, and gave judgment against the defendant for nine dollars and some cents on the hearing of the case.

The overruling of the demurrer is now assigned as error.

GRAHAM, of Greene, for the plaintiff in error.

WEBB, contra.

GOLDTHWAITE, J.—The statute provides, that all appeals from a justice of the peace shall be tried *de novo*, according to the justice and equity of the case, without regarding any defect in the summons, or other proceedings before the justice. [Clay's Dig. 314, § 10, 12.] The defence interposed in the Circuit Court is of that class, which the law considers as going to the merits of the case; and although neither party, when the amount is so small as this, is bound to any formal mode of allegation or pleading, yet when both adopt it without exception, there is no reason why the Court should not proceed upon the pleadings, as in other cases.

The demurrer ought not to have been sustained, as the defence urged, was as valid, as it would have been if interposed in the first instance in the Justice's Court.

Let the judgment be reversed, and the cause remanded.

WINDHAM, USE, &c., v. CHILDRESS & SKANES.

1. Where one, previous to the passage of the Penal Code, lost a horse by a bet upon a horse race, delivered the horse to the winner, and afterwards repurchased him, executing his note for the price, he cannot when sued upon the note, defeat the action, by proving the illegality of the original consideration, by which the plaintiff acquired the horse.

2. Whether the provision of the Penal Code, extends to money, or property, lost upon a horse race—*Quere?*

Error to the Circuit Court of Butler County.

ASSUMPSIT by the plaintiff in error against the defendants in error, upon a promissory note.

Upon the trial, it appeared that the defendant, Childress, and one Sutton, made a bet upon a horse race; that Sutton won the race, and the horse which had been staked upon the issue of the race, was given up to him. That eight or ten days afterwards, Childress purchased the horse from the plaintiff, who was interested in the bet, and had purchased the interest of his partner, and executed to him the note sued on in payment, and that the beneficial plaintiffs became interested in the note without any knowledge of the consideration.

The plaintiffs' counsel moved the Court to charge the jury, that the plaintiffs were entitled to recover, notwithstanding the consideration on which the note was founded. Also, that if the beneficial plaintiffs were purchasers of the note for a valuable consideration, without notice of the circumstances under which it was executed, they were entitled to recover; which charges the Court refused to give, and the plaintiff excepted.

The assignment of error, is the refusal to charge, as stated, in the bill of exceptions.

G. W. GAYLE, for the plaintiff in error, cited 1 Littell, 50; 1 Monroe, 115; 2 Bibb, 300; 7 Porter, 251; 5 Ala. Rep. 708.

ORMOND, J.—Although the law will not lend its aid to enforce an illegal contract, yet if it be executed, and the parties are *in pari delicto*, it will not interfere between them. [Black & Manning v. Oliver, 1 Ala. Rep. 449.] So, if, upon an illegal contract, the possession be parted with, and the former owner regain it by fraud, or force, he cannot defend himself, and retain the possession, by showing that he parted with it upon illegal, or immoral consideration, and that the contract was in violation of a public statute. This is the principle of the case of Rochelle v. Harrison, 8 Porter, 351, where it is said, "what the law will not accord by suit, cannot be attained by fraud, or force. Whenever the title to property, has once

passed by an executed contract, it cannot be revested by recaption, or by any other mode of acquiring the possession."

These principles are decisive of this case, when the horse was won, and delivered to the plaintiff, upon his winning the race, upon which it had been bet, the only statute in force was the act of 1807, making all gaming contracts void, and which, by the provisions of the act, extended to horse racing. But upon the delivery of the horse, the property vested absolutely in the winner, and as the loser, could not have repossessed himself of the horse by fraud, or force, and have defended himself by showing the illegality of the contract, by which he parted with it, still less can he be allowed to do so, when he has regained the possession, by a contract to pay a sum of money. At the time this contract was made, the provisions of the penal code, (Clay's Dig. 434, § 17,) which authorizes the recovery of money, or property lost at gaming, was not in force, admitting that the provision extended to money, or property, lost upon a horse race.

Let the judgment be reversed, and the cause remanded.

HANDLEY v. DOBSON'S ADM'R.

1. In an action for the recovery of money due on a promissory note, the defendant cannot under the plea of set-off, give in evidence a writing by which the plaintiff promised to pay to him "fifty barrels of corn;" because the value of the corn is not ascertained, either by the contract of the parties, or the law.
2. Where the maker of a promissory note makes a partial payment on it, before it matures, without an agreement, either express or implied, that interest shall be added, upon such advanced payment up to the maturity of the note, he will not be entitled to a deduction therefor.

Writ of error to the Circuit Court of Talladega.

The defendant in error declared against the plaintiff upon a promissory note, by which the latter, on the 26th of August, 1842, promised to pay the intestate of the former, the sum of three hundred dollars, on the 25th of December, 1843. The cause was tried on the pleas of *non assumpsit*, set off, want of consideration, and failure of consideration. On the trial, the defendant offered in evidence a note of the following tenor, subscribed by the intestate, viz: "By the first day of October next, I promise to pay James M. Handley or bearer, fifty barrels of corn, value received, 26th of August, 1842." He also offered to prove, that corn was worth two dollars in the intestate's neighborhood when the note matured; but this evidence, as well as the note itself, were rejected as inadmissible.

On the note declared on, a credit was indorsed for seventy-five dollars, dated the 24th December, 1842. The defendant's counsel prayed the Court to charge the jury, that if they believed this credit had been correctly entered, twelve months before the note become due, they ought to allow the defendant interest thereon from its date. This charge was refused, and instead thereof, the jury were instructed, that they ought to deduct the credit from the amount for which the note was given, and return a verdict in favor of the plaintiff, for the balance, with interest from the maturity of the note. The several points stated are duly reserved by bill of exceptions. A verdict was returned in obedience to the instructions of the Court, and judgment rendered accordingly.

S. F. Rice, for the plaintiff in error, insisted, that the note for the payment of the corn was a good set off, and the evidence to show the value of the corn was indispensable, to enable the jury to determine how far the plaintiff's recovery should be reduced. [1 Stewt. Rep. 524; 2 Stewt. Rep. 444; 1 Ala. Rep. N. S. 83; 3 Id. 16, 371; 6 Id. 324.] Justice required the plaintiff to pay interest upon the payment credited on the note.

B. F. Porter, with whom was W. P. Chilton and F. W. Bowdon, for the defendant in error. The note offered as a set off, is an undertaking to pay in corn, but does not ascertain and determine its price; the amount then is unliquidated, and under our statutes connot be set off. [Babbington on Set Off, 33; 4 Esp. Rep. 207; 1 Ala. Rep. N. S. 637; 2 Id. 71.]

COLLIER, C. J.—Under our statute it has been held, that unliquidated damages are not the subject of a set off. [Dunn use, &c. v. White and McCurdy, 1 Ala. Rep. N. S. 645.] "The damages resulting from the breach of a contract, are unliquidated, when there is no criterion provided by the parties, or by law, for its ascertainment." [McCord v. Williams and Love, 2 Id. 71; see Clay's Dig. 338, § 141; Reab v. McAllister, 8 Wend. Rep. 112; Butts v. Collins, 13 Id. 139; McDonald v. Neilson, 2 Cow. Rep. 139; Hepburn v. Hoag, 6 Cow. Rep. 613; Gordon v. Bowne, 2 Johns. Rep. 150, 155.]

The writing offered as a set off, does not ascertain the value of the corn, which the plaintiff agreed to deliver to the defendant; nor does the law fix the price, or furnish a criterion by which it may be settled. The case then cited, from 1 and 2 Ala. Reports, are conclusive to show, that the decision of the Circuit Court in rejecting it as evidence, was entirely correct.

It cannot be assumed, that if the maker of a promissory note makes a partial payment on it, before its maturity, that he is entitled to interest upon the amount paid, up to the time the note become due. A party is not bound to pay his debt before the expiration of the term of credit for which he has stipulated; if he does, he cannot as matter of right, claim a deduction for interest. If the debtor pays money in anticipation of the appointed day, without an agreement either express, or implied, between himself and the creditor, his debt will be extinguished *pro tanto*, and no more. The creditor may prefer to have his money at the time provided for its payment, to a less sum at an earlier day; if so, it is his right, and he may insist on being paid *in toto*.

It follows, that the law was correctly adjudged; the judgment of the Circuit Court is therefore affirmed.

TOULMIN, ET AL. v. HAMILTON, ET AL.

1. A writ of error sued out in a Chancery case in the names of the parties to the original bill, where new ones are made by a supplemental bill, is irregular; but, under the statute the writ is amendable by the record.
2. Where one procures bills to be drawn for his accommodation, and afterwards executes a deed of trust as a security to the acceptors, to secure promissory notes which are given as well for the amount of the accepted bills, as for an amount due the acceptors, on account stated; the holders of the bills may resort to the trust property for the payment of them when dishonored, if the promissory notes have not been negotiated to *bona fide* purchasers, for a valuable consideration.
3. *Quere?*—Whether the trust fund is first to be applied to discharge the sum due the acceptors of the bills upon the account stated, or divided *pro rata*, to that and the several bills.
4. Where a bill is filed by the holder of a bill of exchange, to subject a trust fund, which the principal debtor has placed at the disposal of the accommodation acceptor, it is not necessary to alledge that the holder has exhausted his legal remedies on the bill. It is only a creditor at large, who is required to show a lien established, by suing out execution.
5. Where several persons are interested in the distribution of a trust fund, this is a sufficient privity to warrant their being made parties to the same bill, either as plaintiffs or defendants.
6. When a bill discloses that one holding a bill, to the owner of which the right of distribution attaches, has the possession merely, and that the ownership is in another, that other is the proper party, and not the one who has the possession merely; but the omission of such a party is no reason to dismiss a bill for want of equity.
7. When after filing a bill some of the complainants become bankrupt, as well as some of the defendants, and some of each party are represented by a common assignee, he is properly made a party defendant upon the supplemental bill of the remaining complainants.
8. If one is improperly made a party defendant, the objection is personal only, and must be raised on demurrer.

Writ of Error to the Court of Chancery for the first district.

THE case made by the bill is this: In the year 1837, one Rufus Green, at Mobile, for the accommodation of Jeremiah Austill, drew four bills of exchange, for five thousand dollars,

on Hamilton & Cole, of New York. One of these bills is dated 4th February, 1837, at sixty days sight; another the 17th of the same month, at sixty days sight; another the 21st of the same month, at sixty-nine days date; and the last of the same date, at seventy-one days date. The first of these bills was discounted soon after its making, by Toulmin, Hazard & Co.; the second was purchased by Sayre, Converse & Co., for a valuable consideration; and the third was discounted by Eli Wainright. These bills are offered to be produced, and the persons severally named as the holders were the complainants. The fourth bill is alledged to belong to the New Orleans Canal and Banking Company, and to be in the possession of George B. Ogden, who is prayed to be made a defendant.

All those bills were afterwards accepted by Hamilton & Cole, between the 13th of February and the 3d of March, 1837. Under the expectation, and belief, that they would pay those bills at maturity, and being then indebted to them in the further sum of 11,533 dollars and seventy cents, Austill, on the 20th of April, 1837, executed to them his two notes, each for the sum of 15,716 dollars and eighty-five cents, payable at one, and two years, as well to secure them against the bills, so accepted by them, as to secure the payment of the account stated. On the 22d April, 1837, Austill likewise executed a deed, by which he conveyed to Robert Hamilton, a resident of Texas, in trust for Hamilton & Cole, certain lands and slaves, which the trustee was to sell at public auction, if the promissory notes, before named, were not paid in two years from date. This deed is alledged to have been duly proved, and recorded, in the proper office, and was delivered to Green, as the agent of Hamilton & Cole. Green afterwards delivered it, with the note first to fall due, to James Martin, for the use and benefit of Hamilton & Cole. The other promissory note was delivered to Sayre, Converse & Co., who offered to produce it, as well as a certified copy of the deed, when requisite.

Hamilton & Cole became insolvent, previous to the maturity of the bills, and none of them were paid, but were returned, protested, to the holders.

The complainants assert, that, as the bills were protested, the lands and slaves conveyed to Robert Hamilton, in trust, cannot be equitably and justly appropriated to the sole use and

benefit of Hamilton & Cole, in payment of the note held by Martin, for their account, but that the avails of the same, ought to be appropriated entirely to the complainants, as holders of the bills, in the proportion that they bear to the whole debt of 31,433 dollars and seventy cents.

Hamilton & Cole, combining with Robert Hamilton and James Martin, hold the deed of trust to be exclusive, and refuse to recognize the rights of the complainants. Martin has indorsed the note held by him, to Robert Hamilton, and obtained a judgment thereon, against Austill, in the United States Court, under which he has caused the equity of redemption of Austill, in the lands, to be levied on and sold, purchasing the same in his own name. Hamilton and Cole have taken all the slaves, except one, which Robert Hamilton permitted, to be sold under an execution against Austill, and sold and delivered them to one Thomas Prince, to satisfy a debt due by them to him.

The prayer of the bill is, that the lands and slaves may be appropriated, *pro rata*, to the payment of the bills and the account stated, due from Austill to Hamilton & Cole; that an account may be stated of the price of the slaves sold to Prince, and the other property, &c. &c.

Hamilton & Cole, Robert Hamilton, Austill, Martin, Ogden, and Prince, are made defendants.

The complainants afterwards moved for leave to file a supplemental bill, making Wm. C. H. Waddle, who is the assignee in bankruptcy of Hamilton & Cole, and P. T. Harris, the assignee in bankruptcy of Daniel C. Fowler, and C. C. Hazard, (parties in the firm of Toulmin, Hazard & Co.,) and of William Sayre, of the firm of Sayre, Converse & Co., and of Jeremiah Austill, parties *defendant*, as it is stated in the transcript.

Leave being given, a supplemental bill was filed, in which Toulmin, William P. Converse, and Eli Wainright are stated as complainants; it recites the filing of the previous bill, in the names of the parties in that behalf stated, against the then named defendants, and that, since the filing of the bill, Sayre, Fowler, Hazard, Austill and Hamilton, have filed petitions to be admitted bankrupts, and that P. T. Harris has been appointed assignee of their several estates, rights, and effects.

A similar statement is made as to Hamilton & Cole, and that

W. C. H. Waddle has been appointed assignee of their estate, effects, &c. It then proceeds to alledge that the complainants, in the supplemental bill, are entitled to have the suit continued in their behalf, and to prosecute against Harris, as the assignee of the defendant, Austill, and of the complainants, Sayre, Hazard and Fowler, and against Waddle, as the assignee of Hamilton & Cole. The supplemental bill varies, slightly, from the original bill, in declaring the fact, that the bills drawn by Green, were payable to, and endorsed by, Austill. Subpœnas are prayed, as to Harris and Waddle only, as the supplemental parties.

Martin alone answered the bill, but the recital of his answer is unnecessary, as the Chancellor, on motion, dismissed the bill, for want of equity. This is now assigned as error.

J. F. Adams and L. Gibbons, for the plaintiff in error, insisted—

1. That the promissory notes executed by Austill to Hamilton & Cole, were merely a security for the payment of the bills, and however the case might be, if those notes had been passed to others, in the course of business, the bill here shows that one of them is held by Martin, for the use of Hamilton & Cole, and the other is held by Sayre, Converse & Co., who do not pretend to have received it under circumstances to vest in them an exclusive right. Therefore, there is nothing to prevent the operation of the rule next relied on.

2. The rule in equity is, that a creditor, or a surety, paying the debt, is entitled to the benefit of all securities, that the debtor has given to secure the debt. [1 John. Chan. 129; 2 Ib. 418; 1 John. Cases, 205; 1 Eq. Ab. 93; 11 Vesey, 12; 14 Vesey, 162; Theob. on Surety, 252; 1 Story's Eq. 481; 4 Dana, 27.]

Stewart, contra, moved to dismiss the writ of error, because it runs in the name of Toulmin, Hazard & Co. complainants, and Robert Hamilton, George B. Ogden, James Martin, Jeremiah Austill, and T. McPrince, defendants. Converse and Wainright are each parties, and are not mentioned. So, also, are Waddle and Harris, who are likewise omitted in the writ.

Upon the merits, he insisted the decree was proper, because—

1. There is no privity between the complainants and defend-

ants. [Story's Eq. Plead. 218, § 262; 395, § 514.] The distinction between the debt, and the surety for the debt, is stated, 7 Cranch, 71.

2. The contract between Austill and Hamilton & Cole, is not one for indemnity, but is an actual payment of what the latter asserted was due. The bills were charged as debits, and the debt created by their acceptance was discharged by the notes. The principle of subrogation does not apply to the case stated.

3. If it did, the bill is fatally defective in not showing a judgment at law upon the bills, and a return of no property. As, until this, the remedies at law may be sufficient, without the aid of equity.

4. There is a misjoinder of complainants, because their titles are several, if they have any, and differently obtained.

5. The parties are not proper. Ogden has no interest whatever, and the bill held by him is owned by the Canal and Banking Company, which is not made defendant.

6. There is a confusion of parties, as the case stands; Converse is a complainant, and Harris, who represents Sayre as the partner of Converse, is a defendant. The same remark applies to Toulmin and to Harris, as representing Hazard and Fowler. It is one portion of a firm, seeking to make another portion defendant to a bill, when the right to recover is a joint right to both partners.

7. There is no equity as to Prince, as the purchase by him is not charged to be fraudulent, or collusive.

GOLDTHWAITE, J.—1. It is certain, the writ of error attached to the transcript entirely misdescribes the parties to the suit, as it stood when the decree was made, but it is equally certain, that it comes within the provision of the statute, authorizing the amendment by this Court, of writs of error. [Clay's Dig. 312, § 39.] The original bill, in connection with the supplemental bill, sufficiently discloses who the parties were, plaintiffs, as well as defendants, at the time of the decree, and the writ of error can be amended by them.

2. We have given an attentive consideration to the case made by the bill, but cannot arrive at the same conclusion as the Chancellor came to. It will be seen, that the sole consideration for the note of 31,000 dollars, and upwards, is alledged

to be the discharge of the previous indebtedness to Hamilton & Cole, by Austill, of something more than 11,000 dollars, and as a security against the payment of the bills drawn in his favor by Green, and indorsed to the several complainants. These bills, it is true, were then accepted by Hamilton & Cole, and they probably considered Austill as their debtor on this account; but it cannot be seriously pretended, they have the right to apply the proceeds of the trust property beyond the 11,000 dollars, to any thing besides the extinguishment of those bills. The deed of trust is a mere security for the payment of the promissory notes, and if these had been passed to innocent persons, in the usual course of trade, the equities arising out of the acceptance, and non-payment of the bills, very possibly might not be open to inquiry; but the bill directly charges, that the deed of trust, with the note which first fell due, was delivered by Green, who received it as the agent of Hamilton & Cole, to Martin, for their use and benefit, and that he, as their attorney at law, indorsed the note to Robert Hamilton, who is the trustee named by the deed. The other is in the hands of Sayre, Converse & Co., who, as complainants, concede, by the allegation and prayer of the bill, that they have no exclusive claim upon it. The notes being thus in the hands of persons, who do not insist upon any right to their proceeds, as purchasers for a valuable consideration, without notice, the equities may be considered, as if they yet were in the possession of Hamilton & Cole, or, of Waddle, their assignee.

The allegation is, that the notes were drawn by Green, for the accommodation of Austill, and the inference, from the original bill, we think, is, that he was also a party; however this may be, the fact is alledged in the supplemental bill, that they were drawn in his favor. The relation of the manner of the execution of the deed of trust, shows, also, that the acceptance, by Hamilton & Cole, was also for his accommodation. Austill, is, therefore, to be considered, as between himself, Green and Hamilton & Cole, as the principal debtor, and the drawer and acceptor, as his sureties. The deed of trust, then, is a security, given by the principal debtor, to one who stands to him as a surety, and the question is, whether the holder of the notes has a right, in equity, to enforce the security for his

benefit. Of this, we think there is no doubt. In Moses v. Murgatroyd, 1 John. Chan. 119, it was held, by Chancellor Kent, that an absolute assignment of goods, intended to indemnify the assignee, on account of his indorsement of notes, was held applicable in equity, to a holder of the notes; and in Phillips v. Thompson, 2 Ib. 418, the same doctrine was applied to a collateral security, taken by the indorser of a note from the maker. In both these cases, the suits were brought by the creditors holding the notes, which were intended to be secured. The same principle is recognized in Manse v. Harrison, 1 Eq. Ca. Ab. 93, and Wright v. Mosley, 11 Vesey, 12; see also 1 Story Eq. § 638.

3. There is a difficulty in this case, even after it is ascertained that the holders of these bills are entitled to any security, given by Austill to Hamilton & Cole, for their indemnity, as the deed of trust is conceded not to have been solely for that purpose, but was also to secure the payment of the sum of 11,000 dollars, and upwards, already due from Austill, but upon which a further indulgence was given. Whether the trust is to be considered as applicable, first, to the benefit of the debt then owing, or is to be divided *pro rata*, we shall not at present decide, for the reason, that it has not been passed on by the Chancellor, and because the matter already ascertained, is sufficient to show there is equity in the bill, even if the holders of the bills, are to be postponed until the debt to Hamilton & Cole is first satisfied.

4. Another reason assumed by the Chancellor for dismissing the bill, is, that it contains no allegation that the legal remedies on the bills have been exhausted. This is certainly an essential averment, when a creditor seeks to have satisfaction out of the equitable estate of his debtor. [Mitford, 128; 2 Story Equity, § 1216, b.] Here, however, the holder of these bills do not claim the interposition of the Court, to have a satisfaction out of the equitable estate of those debtors merely as such; but they desire a fund specifically appropriated by the debtor, for the purpose of paying those bills, may be applied to that object. It is a trust which results from the nature of the appropriation, and is an original ground of equity jurisdiction. In Neale v. Marlborough, 3 Mylne & Craig, 407, Lord Cottenham endeavors to ascertain the principle upon

which it is held essential, in Courts of equity, that a general creditor, when, seeking to subject an equitable freehold interest of his debtor, in lands, shall be held to alledge and prove the suing out of an *elegit*, and then says, "it is not correct to say the creditor obtains a lien, (or the equitable estate), by virtue of his judgment. It he had an equitable lien, he would have the right to come here to have the estate sold." We have been referred to no decision, where it is maintained, that a creditor, having a trust created for his benefit, either expressly, or by implication, can be refused the aid of a Court of equity to enforce it, on the ground that he has omitted to proceed at law, against the legal estate of his debtor, nor in any way affected by the trust. As we unnderstand the rule, it is only a creditor at large, who is required to show that his lien at law, has attached by suing out execution.

5. Independent of these objections, it is urged, there is no privity between the complainants and the defendants. This objection seems to us to be founded in a misapprehension of the ground, upon which the aid of the Court is invoked. The holders of the bills do not pretend they have any right to interfere in the administration of the trust, but they state the facts, from which they claim the trust shall be applied for their benefit, instead of those who are indicated by the deed. It is the trust for the common benefit of the holders of the bills, which establishes the privity between them, and those who are seeking to misapply the trust fund, and, in our judgment, the existence of the trust once established, the privity becomes apparent, as a matter of course.

6. It is very certain, that Mr. Ogden has no interest in the subject of this suit, if the statement in the bill, in that respect, is accordant with fact, as it is said, the bill in his possession is owned by the New Orleans Canal and Banking Company; but this defect does not warrant a dismissal of the bill, without giving the opportunity to amend it. The rule is, that whenever the want of proper parties appears on the face of the bill, it is good cause of demurrer, and if the parties omitted are necessary to the decree to be made under the bill, the exception may also be insisted on in the answer, or at the hearing; but in such cases, the Court will always give leave to make new parties, either by amendment or by supplemental bill.

And even if the bill is dismissed for this defect, the dismissal will be without prejudice. [Story Eq. Plead. § 541; Batre v. Auze, 5 Ala. Rep. 173.]

7. The other objections, as the confusion of parties, as they are made by the supplemental bill, do not seem to be sustained by the record, or, rather the confusion is in appearance only, and is caused by the circumstance, that several of the parties, plaintiffs as well as defendants, have become bankrupt, since the institution of this suit, and they are all represented by the official assignee. It is said that Harris, as assignee of one of, or more of the complainants, cannot sue himself, as the assignee of one or more of the defendants. This may be entirely true, and yet the necessity may exist, that all the bankrupt estates shall be before the Court by their assignees. Here the assignees are made parties, defendants, and the Court, in its decree, will ascertain, and if necessary, separate the rights, which may pertain to each. We think the assignees were properly made parties defendants, and as to the other defects of the supplemental bill, they are either immaterial, or should have been reached by demurrer.

If Prince is improperly made a party, it furnishes no reason to sustain the decree dismissing the bill. Such an objection is personal only, and can only be raised on demurrer. [Erwin v. Ferguson, 5 Ala. Rep. 158; Story's Eq. Plead. § 544.]

Our conclusion is, that the bill contains equity, and therefore, the decree dismissing it for the want of equity, is reversed and the cause remanded.

BLEVINS v. POPE & SON.

1. General reputation is inadmissible to prove the fact of agency.
2. It is in the discretion of the primary Court to permit, or refuse, a leading question to be put by a party to his own witness, and cannot be revised on error.
3. Where the action as in trover, for the conversion of a note, charges the defendant with the possession of the instrument, the rule as it regards the preliminary proof previous to giving secondary evidence of the contents, does not apply. Nor does it vary the case, that it comes out in proof, that the note is not then in possession of the defendant, but is in the possession of the maker; in the absence of proof to the contrary, it will be presumed that he placed it there, and that it is still under his control.
4. A principal may ratify the unauthorized act of his agent, and such ratification may be either express, or implied; but to be binding on the principal must be deliberately made, with full knowledge of the material facts.
5. A demand of the agent, by the principal, of money, which the former had wasted, or misapplied, is not a ratification of his tortious act.

Error to the Circuit Court of Dallas.

TROVER by the defendant against the plaintiffs in error, to recover damages, for the conversion of a promissory note for $1,503 30, made by Wm. Johnson & Co. to the plaintiffs.

Upon the trial, the plaintiffs introduced Frederick Dorr, of the firm of Wm. Johnson & Co., and offered to show by him, that Mr. Beal Cook, who had passed off the note in controversy, to the defendant, had the general reputation in the community, of being the general agent of the plaintiffs; which evidence the Court rejected, and the defendant excepted.

During his examination, the witness had given a description of the note, and its contents. The defendant's counsel, on the cross-examination, asked him if the note was not in his possession, and if he could not find it upon diligent search—he admitted he could. He admitted, also, that he had been several times requested, by the plaintiffs counsel, to search for it; that he had done so, partially, and could not find it, and had told them so; and that he had no particular desire to find it. Thereupon, the defendant's counsel moved the Court to ex-

clude from the jury all the evidence of the contents of the note; which the Court refused, to which the defendant also excepted.

Upon the re-examination, the plaintiff's counsel asked the witness, "was not the note for 1,503 30?" which question the defendant objected to, as leading. The Court permitted it to be answered, assigning as a reason, as appears from the bill of exceptions, that the witness had given his recollection fully, upon the examination in chief, as to the description of the note. That the effort, on the cross-examination, was to show that the note was different from that described in the declaration, and that the memory of the witness was treacherous. The Judge adds, *it was perfectly evident the witness had no leaning towards the plaintiff.*

The defendant offered in evidence, and read to the jury, a letter from the plaintiffs to Beal Cook, written subsequent to the trading of the note to the defendant, mailed at Mobile, and dated 20th November, 1841, as follows:

Mr. Beal Cook, New Orleans:

Sir—We received your inclosure of several notes some time ago, and a statement of your transactions, and we hand you over your account current—amount to your debit, $3,875 56, for which you must send your note. Since you were here, we have had a true history of your movements through the country last summer, your visit to Columbus, your stay at Blount Springs, &c. &c., and we are told, from undoubted authority, that your losses at gambling are not so heavy as you represent them, and we feel fully persuaded that you must have a considerable quantity of our money on hand now. We feel assured, at all events, that the amount you collected from Gaither is, or was, in your hands when you were here. Who furnished you with the means of travelling from one city to another, and stopping at the best hotels? We know you had no means of your own. We tell you, that if you have any money of ours, to send it over, if you know your own good, &c.

In the letter is an account stated between A. Pope & Son and Beal Cook, in which he is charged with sundry items as cash, and, under date of 12th Oct. 1841, with "Wm. Johnson & Co. note, $1,503 30," and a balance struck against him of $3,875 56.

The Court charged the jury, that the fact that the plaintiffs had charged Cook, in the account current, with the note sued for, as shown in their letter, did not amount to a ratification of Cook's disposal of the note to Blevins, the letter being all the evidence that the plaintiffs had knowledge of such disposal.

The defendant moved the Court to charge the jury, that, if the plaintiffs, with a knowledge of the fact of Cook's disposal of the note to Blevins, failed to disapprove the contract, in a reasonable time, they were bound by Cook's act; which charge the Court refused, and charged the jury, that an unreasonable time had not elapsed before the institution of this suit, it being in evidence that the note was converted in the month of October, 1841. To the refusal to charge, and to the charges given, the defendant excepted, and now assigns for error, as also, the various matters arising on the bill of exceptions.

Hopkins and Gayle, for plaintiffs in error, contended, that the Court erred in permitting parol evidence of the contents of the note, after it was shown not to be in the possession of the defendant, but in that of the plaintiff's witness.

That a leading question could not be put by the plaintiff, to his own witness, unless, by his demeanor, he had evinced a leaning to the defendant, but the record showed that he was impartial.

They also insisted, that the charge of the note to Cook, the agent, was a ratification of the contract. That, if one having a right to treat an act as a tort, or as a contract, elects to consider it a contract, it is as if the tort had never existed; which they insisted was the fact in this case. [7 Term, 212; 2 Mass. 106; Story on Ag. 248; Liv. on Ag. 47; 2 Stark. Ev. 58; 2 Stewart, 479; 1 John. Cases, 110; 1 Caine's Cases, 526; 12 Mass. 60; 3 W. C. C. R. 151.]

They also cited, 2 Stark. Ev. 56; 1 Id. 123; 12 Johns. Rep. 300; 3 Cow. 281; 14 S. & R. 27.

Edwards, contra. In an action of trover for a note, the contents may be proved, without giving notice to produce it. [Chitty on Bills, 616; 14 East, 274; 3 N. H, 15.]

To show the right of a party to ask leading questions of his own witness, and that it was a matter in the discretion of the

Court, he cited 1 Starkie Ev. 123, 131, 151; 16 S. & R. 78; 2 Phillips' Ev. 724.

He contended that there was no proof in the record, that the plaintiffs had any knowledge, when they wrote the letter to Cook, that he had transferred the note to the defendant, but that the fair inference was, that they had supposed he had collected it.

ORMOND, J.—If it was important to prove, that Cook was the general agent of the plaintiffs, it could not be shown by general reputation. Reputation, is evidence in cases of pedigree, and, perhaps, in some other peculiar cases, but these are exceptions to the general rule, and submitted to from the necessity of the case, and has never, within our knowledge, been admitted as proof of agency.

The general course of the examination of witnesses, and the difference between an examination in chief and a cross-examination, is perfectly well understood. The whole doctrine rests upon the supposition, that the witness is more favorable to the party who calls him, than to the other side. Though this may be generally true, it frequently happens that parties have to call witnesses who are unfriendly to them, and if confined to the usual course of an examination in chief, would not be able to elicit the truth. When, therefore, the witness, by his demeanor, manifests an unwillingness to tell what he knows, or betrays a leaning in favor of the other side, the Court will permit leading questions to be put, for the purpose of eliciting the truth. It is clear, however, that this must rest in the discretion of the Court, from the impossibility, in most cases, of putting the facts on the record, so that they might be reviewed. [1 Starkie, 131; and see the cases collected by the editors, 2 C. & H. 724, note 506.] It results from this, that the presiding Judge need not state his reasons for permitting a leading question to be put, upon the examination in chief, as they would be mere conclusions, and not facts, susceptible of revision.

It is, however, urged, that the presiding Judge indorses the impartiality of this witness, and shows that no reason existed for the permission given. The facts to which the witness testified, show his bias to the other side, and that he had, in truth, identified himself with the defendant; and when the Judge as-

signed, as a reason for permitting the leading question to be put, "*that it was perfectly evident the witness had no leaning towards the plaintiff*," his meaning could not be misunderstood by those who heard it; nor can it be misapprehended here. Instead of affirming his impartiality, it was intended, and doubtless well understood, to be a charge that he was unwilling to state, what he evidently knew.

The rule in relation to the right to give secondary evidence of the contents of a written instrument, does not apply where the action charges the defendant with the possession of the paper, as in this case. In How v. Nickols, 14 East, 274, which was trover for a bond, Lord Ellenborough remarks, "The plaintiff is to show, as well as he can, what the instrument is, which he seeks to recover as his own, from the possession of the defendant; and if he give a wrong description of it, the defendant may set it right by producing the thing." The rule as above laid down, is admitted, but it is said, that where, as in the present case, it is shown that the note is not in the possession of the defendant, the rule does not apply.

We do not consider, that the facts of this case take it out of the general rule. It appears that the note came to the possession of the defendant, and is afterwards found in the possession of the makers. In the absence of proof to the contrary, the inference must be, that he placed it there, and that it is still under his control. The plaintiffs have done all in their power to produce it on the trial, and were, therefore, justifiable in giving secondary evidence of its contents.

The only question of any difficulty remains to be considered, whether the plaintiffs ratified the disposition of the note, made by Cook? There can be no doubt that the principal may ratify the unauthorized act of his agent; and this may be either express or implied. Such ratification, when deliberately made, with full knowledge of the material facts, becomes as obligatory on the principal, as if the agent had originally acted with full authority from the principal. [Story on Agency, 245–254, and cases cited.]

To establish a ratification in this case, the counsel for the defendant rely upon the fact, that the plaintiffs charged the agent with the amount of the note traded to the defendant, and desired him to send his note for that sum, which is relied upon as

an implied ratification of his acts, and the case of Cushing v. Locker, 2 Mass. 106, is relied upon as an authority in point.

As there can be no ratification binding on the principal, either express, or implied, which is not made upon full knowledge of the material circumstances, we will first proceed to the inquiry, whether the record discloses such knowledge, on the part of the plaintiffs. That they had such knowledge, is attempted to be derived from the letter in evidence, in connection with the account rendered.

This letter of the plaintiffs, is founded upon a previous letter from the agent to them, of which we know nothing, further than its contents may be gathered from this, which is evidently in reply to it. It commences by acknowledging the receipt of some notes, and "a statement of the agent's transactions," and proceeds, "we hand you over your account current—amount to your debit," &c. Is it a reasonable inference, from this statement, that the plaintiffs knew, that the agent had traded off, or disposed of, this particular note, to the defendant. We do not think any such inference can fairly be drawn from it. We can collect from the letter, that Cook had been a clerk in the plaintiffs' house, and had been sent into the country with notes for collection. It also appears that he had been in Mobile after these transactions took place, and alledged to his employers, that he had lost the money by gambling. They then proceed, on information they had received, to charge him with having a considerable quantity of their money on hand then, adding, "we feel assured, at all events, that the amount you collected from Gaither, is, or was, in your hands, when you were here."

The note sued for, being included in the account rendered against the agent, is certainly evidence, that the plaintiffs knew it had been either collected by the agent, gambled off, or in some other way disposed of, and it appears to us quite as reasonable to suppose, that they were under the impression it had been collected from the makers, as that they knew it had been traded off, or disposed of in any other way. In regard to Gaither's note, they expressly charge him with having collected the money, and this charge, it is to be observed, is introduced after having accused him with having a considerable quantity of their money, and is introduced by alledging, "at all events,"

&c., which is, in effect, saying, you must have a much larger amount, but certainly have that amount.

If, however, it were conceded that the letter afforded evidence, that the plaintiffs knew, that this note had not been collected, but had been disposed of in some other way, most assuredly no inference can be drawn from it, that they knew it had been passed off to the defendant. But, certainly, this knowledge was of vital importance to enable them to decide, whether they would look for remuneration to the clerk alone, or endeavor to pursue the note in the hands of such third person. It is also open to observation, that this letter must have been furnished to the defendant by the agent, and if, in fact, he had disclosed to the plaintiffs, that he had not collected the note, but had disposed of it to the defendant, it is not unreasonable to suppose the proof would have been made.

If, however, it were admitted, that the plaintiffs, when they presented their account, and desired the agent to send them his note, knew all the facts, we are not prepared to say, that it would have been an adoption, and ratification of the act.

Implied ratifications proceed upon the supposition, that the conduct of the principal is inconsistent with his allegation, that the agent had no authority. In such cases the act of the agent is presumed to be adopted, because the conduct of the principal is only explicable on that hypothesis; but, certainly, the demand of an agent, of money, which he has wasted, ought not in law, to amount to an adoption of his *tortious* act. On the contrary, it would seem to be, the natural and proper course to be pursued, and so far from being an affirmance of the *tort*, or adoption of the illegal act, would be a direct disaffirmance of it.

This was the view taken by the Court of King's Bench, in Taylor v. Plummer, 3 Maule & S. 562. There, an agent being intrusted with a large sum of money, to be invested in exchequer bills, fraudulently invested it in stock of the Bank of the United States, and bullion, and absconded. He was overtaken by a police officer, and the attorney of the principal, as he was about to embark for the United States, and then delivered up the bank stock, for the benefit of his principal, and executed a bond, and warrant of attorney, to confess a judgment in his favor, for the amount so converted to his own use. The agent

became a bankrupt, and his assignees brought suit against the principal, to recover the stock. The Court held, that, as the principal could have recovered it from the assignees of the bankrupt, he could retain it when sued by them. In regard to the supposed ratification, by taking the bond and warrant of attorney, to confess judgment, Lord Ellenborough says, "If this case had rested on the part of the defendant, on any supposed adoption, and ratification on his part, of the act of converting the produce of the draft, or bank notes, into these American certificates, we think it could not have been well supported, on that ground, inasmuch as the defendant, by taking a security, by bond and judgment, to indemnify himself against the pecuniary loss he had sustained, by that very act, must be understood to have disapproved, and disallowed that act, instead of adopting and confirming it."

So, in the case of Hunter v. Prinseps, 10 East. 392, which was an action of assumpsit for the proceeds of a cargo illegally sold, and converted, before it had arrived at its place of destination, it was insisted, that by suing in this form, the plaintiff had adopted and confirmed the act of the master, and that, therefore, he was entitled to a *pro rata* freight. But the Court held, that by suing in that form, the plaintiff merely waived his right to damages, for the *tortious* act, and was entitled to recover the proceeds of the sale, as the value of his goods.

We do not consider it necessary to examine the propriety of the last charge of the Court, as the motion for the charge assumes the existence of a fact, which was not in proof, and was therefore abstract.

Let the judgment be affirmed.

JOHNSTON v. THE BRANCH BANK AT MONTGOMERY.

1. When a slave remains in the possession of a person other than the owner, for more than three consecutive years, under a contract for hire, made publicly or privately, the case does not come within the second section of the statute frauds, so as to subject the slave to the payment of the debts of the person in possession.
2. The levy of an attachment on a slave to pay the debt of a person to whom she was hired, the interposition of a claim of property, and the execution of a bond pursuant to the statute, interrupts the continuity of the hirer's possession, and again restores the slave to the owner. And thus precludes the creditors from deriving any benefit from the previous possession of the hirer, (which was short of three years,) if it were possible for such possession, when added to that subsequently acquired, to avail anything.
3. Where the fair inference from the proof offered, is, that its only effect, (if any,) was to show that a transaction between the parties, disconnected with that before the Court, was fraudulent, it should not be permitted to go to the jury. It is not permissible to give evidence of one fraud, that it may be inferred that the party was guilty of another, with which he is charged.

Writ of error to the Circuit Court of Montgomery.

On the third day of April, 1843, a writ of *fieri facias* at the suit of the defendant in error, was issued against the goods and chattels, &c. of Charles Mervine, requiring to be made the sum of nine hundred and seventy-five 50-100 dollars, besides costs. This writ was levied on a negro woman named Mary, and her child Isabella, as the property of the defendant in execution. The plaintiff in error interposed a claim to these slaves, by making an affidavit and entering into bond, with surety, as provided by statute.

An issue was made up and submitted to a jury, to try whether the slaves were subject to the execution. On the trial, a bill of exceptions was sealed at the instance of the claimant, which, so far as material, may be thus briefly recited. The execution was levied on the slaves in question, on the 15th of April, 1843, who were then in the possession of the defendant

in execution. It was shown by evidence, that the claimant purchased the woman, Mary, on the 1st February, 1840, and on the same day sent her to the defendant's house, to wait on his (defendant's) wife, who was claimant's sister, and then sick. The parties all resided at the time, in the city of Montgomery, though not at the same house. Up to June, 1840, the woman washed, &c., for the claimant, but lived in defendant's family, cooking and waiting on them, also. In the month and year last above stated, the claimant left the woman in Mervine's possession, with directions to take good care of her, until his return from Georgia, which, it was supposed, would be in the succeeding fall. The claimant did not return at the expected time, but has remained in Georgia ever since his departure from Montgomery.

An attachment ancillary to the suit, consummated by the judgment on which the execution in the present case issued, was issued about the 1st of March, 1842, and on that day levied on the woman Mary, and her child Isabella, (who was born the 27th January preceding.) The slaves were confined in jail under the process. The claimant being advised thereof, came immediately to Montgomery, interposed a claim, in due form, and executed a mortgage to his surety in the claim bond, on the woman and her child, for his indemnity. But this evidence, as to the claim and mortgage, were objected to by the plaintiff in execution, and rejected.

The evidence of the defendant and wife showed, that on the 16th of March, 1843, Mary was hired to the former by the claimant, at the rate of $100 *per annum*, and under this hiring remained in the defendant's possession, up to the levy of the execution.

The levy of the ancillary attachment was dismissed on the same day, but previous to the levy of the execution. Immediately thereafter, the claimant was advised of the proceeding, came from Georgia, and interposed the claim now in controversy.

It was also proved, that the defendant had paid nothing for hire, but there were unsettled accounts between himself and the claimant.

The plaintiff offered to prove that the defendant was in possession of a blacksmith shop, the business of which, above

all expenses, was worth about $1,000, which he sold about the 16th March, 1842, to the claimant; the latter agreeing to pay the defendant, as his agent, the sum of one thousand dollars, *per annum*, to attend to the shop. *Further*, that the plaintiff, between the 1st and 15th March, 1842, caused garnishments to be served on different persons indebted to the defendant, for work previously done in the shop. To this evidence the claimant objected, but his objection was overruled, and the evidence permitted to go to the jury.

Upon these facts the following points were ruled by the Court: 1. In order to prevent personal property from becoming liable to the debts of one who has been in possession of it under a contract of hiring, for three years, without demand made and pursued by due course of law, it must appear that the hiring was not only *bona fide*, but public and open to the world. 2. That the claim interposed in March, 1842, and the execution of the mortgage by the claimant for the indemnity of his surety, did not in any manner interrupt the continuity of the defendant's possession. 3. That all the proceedings consequent upon the levy of the attachment, did not amount to a demand made and pursued by due course of law, so as to prevent the operation of the act, which makes three years possession under a loan, effectual in favor of the creditors, &c. of the loanee.

The jury returned a verdict, in which they found the woman subject to the execution, &c., and that the child is the property of the claimant, and judgment was rendered accordingly.

T. Williams, for the plaintiff in error.

J. A. Elmore, for the defendant in error.

COLLIER, C. J.—In the Bank of the State of Alabama v. Croft, 6 Ala. Rep. 622, we determined, that where a person acquires the possession of slaves under a contract with the owner to pay hire for their services, and restore them to him at the end of the year, a renewal of the contract from year to year, so as to continue the possession of the hirer without interruption, for more than three consecutive years, is not a loan, &c., within the second section of the statute of frauds. We say further, that whether the hiring is private or public,

the effect is the same, and shows that the possession is parted with for a valuable consideration, which has been often held to be the meaning of the terms, "good consideration," as used in the act.

No evidence was adduced to impugn the fairness of the contract of hiring, and no charge was given to the jury by which their inquiries were directed to that point; but the ruling of the Court assumed, that it was not only necessary that the transaction should have been *bona fide*—it should also have been public and open to the world. In saying that publicity was essential to protect the rights of the claimant, the case cited is conclusive, to show that the Circuit Court misapprehended the law.

We think it entirely clear, that the levy of the ancillary attachment in March, 1842, on the woman, her retention by the officer until the claim of property was interposed, interrupted the continuous possession of the defendant in execution. The levy placed her in the custody of the law, and when the bond was executed for the trial of the right, the claimant became her custodian. If he afterwards delivered her to the defendant, either upon a loan or for hire, the defendant's possession (if an important consideration) could only take date, so far as it concerns the statute of frauds, from the time of such second delivery. This conclusion seems to us so clear, as not to require illustration.

In respect to the evidence of the sale of the blacksmith shop, by the defendant to the claimant, the employment of the former by the latter as his agent, &c., we are unable to discover any ground upon which to rest its admissibility. It perhaps, was intended to show a fraudulent purpose, on the part of both the defendant and the claimant, and that the latter actually lent himself to the consummation of a fraud prejudicial to the plaintiff. Conceding, that the transaction developed by this evidence presents an unnatural and unfavorable exterior, and we cannot conceive how it can affect the claimant's right to the slave in question. It is wholly disconnected, so far as we can learn from the proof, with defendant's possession; and evidence of one fraud, will not warrant the conclusion that the party is guilty of another with which he is charged.

This evidence does not appear to have been offered for the purpose of laying the ground for a presumption, that the purchase money of the blacksmith shop was paid by the sale of the slave. If so, it was very insufficient to establish that conclusion. In every view in which it has presented itself to us, we think it was *prima facie* irrelevant, and should have been rejected.

The consequence is, that the judgment of the Circuit Court must be reversed, and the cause remanded.

CRAWFORD, ET AL. v. BRANCH BANK AT MOBILE.

1. Under the act of December, 1841, a note payable to B. G. cashier, and described in a notice under the statute by the State Bank or Branch Banks, is sufficient to show that the title is in the Bank.
2. An objection taken at the trial to the notice, certificate, and note, is not sufficiently specific to reach a supposed defect of authority in the person serving and returning the notice.
3. Courts will, *ex officio*, take notice of the returns made by Bank agents, in the same manner as they do returns by sheriffs.
4. It is contrary to the duty of a clerk to transmit original papers pertaining to the cause below to this Court. Copies only should be sent.

Writ of error to the Circuit Court of Mobile.

MOTION by the Bank, under the statute, against Crawford and David Files, for judgment for the amount of a promissory note, made by them and one R. G. Gordon, on the 31st of March, 1841, for 3,817 50-100 dollars, negotiable and payable at the said Bank, two hundred and fifteen days after date, payable to B. Gayle, cashier, or order. The defendants appeared, a jury was called, and sworn, to try the issue joined between the parties, and a verdict was returned upon which judgment was entered. No issue is found in the transcript, but a bill of

exceptions was taken to the opinion of the Court, entertaining jurisdiction of and rendering judgment in the cause, upon the evidence produced. This evidence consisted, 1st, of the notice by the president, describing the note substantially the same as previously stated, and to which notice is attached the certificate of the president of the *bona fide* ownership by the Bank of the note. This purports to have been executed and returned by Jacob J. Marsh, agent. 2. The note, such as has been previously described, which has no indorsement upon it. 3. The protest of the note. No other or further proof was offered to sustain the motion.

The defendants now assign as error:

1st. That it does not appear from the record, that the plaintiff has any legal title or interest in the note, for the amount of which judgment is rendered.

2d. That it was not proved to the Court below that Jacob J. Marsh was the agent of the Bank; nor was his hand writing proved.

CRAWFORD, *pro se.* cited McWalker v. Bank at Mobile, 3 Ala. Rep. 153, and Gildersleeve v. same Bank, decided at the same term, to the first assignment. As to the second, he insisted that Marsh was not a public officer, such as the Courts *ex officio* will recognize. Even a *pro tem.* president, is not such an officer. [Crawford v. the Bank at Mobile, June Term, 1844.]

DARGAN, contra.

GOLDTHWAITE, J.—The judgment of reversal which was given a few days since in this case, must be set aside, as it was grounded on the first assignment of error, and as to that our attention has been since called to an act, approved the 4th December, 1841, which provides, "that all notes, bills, bonds, or other evidences of debt held by the State Bank, or Branch Banks, payable to the cashier, or the person who has filled the office of cashier, of said Bank, or Branch Banks, may be sued and collected in the name of the several Banks, in the same manner, as if they had been made payable directly to the said Bank, or Branch Banks by which the paper has been taken or discounted. Also, that no notice, writ, declaration,

or judgment, which has been issued, filed, or rendered on such papers, shall be abated, set aside, or reversed, on account of the want of assignment, transfer, or indorsement of said paper by the officer or person acting as cashier. But the legal title to such paper, for all purposes of suit or collection, shall be deemed to have been in said Bank, or Branch Bank, by whom the paper was discounted." The case of McWalker v. The Bank, was determined at the June Term, 1841, and probably induced the enactment of the statute we have quoted. The statute disposes of the question raised by the first assignment, for under its influence the description of the note as payable to B. Gayle, cashier, shows *prima facie* that the legal title was in the Bank.

2. With respect to the objection, that the person returning the notice was not shown to be the agent of the Bank, we are satisfied it cannot be raised in the manner, and at the stage of the proceedings that it was, even if the objection itself is of any value.

3. But as this seems a favorite subject of exception just now, and is presented on the record, it is proper to announce what our opinion upon it is. The act of 1841, (Clay's Dig. 118, § 86,) authorizes the State Bank and its several Branches to appoint an officer with this name, and his duty is to serve notices and writs, and perform other duties which hitherto have appertained to the office of sheriff. We purposely avoid the expression of any judgment, whether the appointment of such an officer can be conferred on the Banks, not because we have formed a contrary opinion, but, because it is highly probable, it will be made a question for our determination. As to his relation to the Courts, it does not seem to differ materially from that of any other executive officer, although it is certain he receives his appointment from a different source. We apprehend the foundation of the rule, that Courts of justice will *ex officio* recognize their own executive officers, as well as their official returns, does not rest upon any actual knowledge, either of the officer, or of his hand writing. It rests upon the necessity which exists for such recognition; and no inconvenience has ever been felt from thus placing it. It cannot, we think, be rationally supposed, that all the Courts have actual knowledge, either of the names or hand writing of the

several sheriffs in the State, and yet they are daily in the habit of receiving returns from them. If these were made by persons having no authority, we apprehend the acuteness of the bar, is amply sufficient to detect and prevent them, as well as to prevent the simulated act from being productive of injury to suitors.

4. Before dismissing this case, we are constrained to notice an act done by the clerk of the Court below, which we consider a plain departure from his duty as required by law. It is in sending up to this Court the original papers connected with the suit below. It is no valid excuse for such an act, that such papers are attached to the bill of exceptions; and independent of its irregularity, withdrawing the papers from their proper place of deposit may be of great inconvenience, if not of serious loss to suitors. In the case before us, we direct the clerk to retain all such papers as are records in the Court below, or otherwise appertain to the suit there. And also to deliver the original papers on application to those entitled to their custody.

Judgment affirmed.

HEIRS AND ADM'R OF HITCHCOCK v. THE UNITED STATES BANK OF PENNSYLVANIA.

1. Henry Hitchcock, a resident of Mobile, indebted to the Pennsylvania Bank of the United States, went to Philadelphia, and whilst there, proposed to the directory of the Bank, to advance him a further sum of money in Mobile; agreeing, upon that condition, to execute his bonds payable by four yearly instalments, for the entire debt, with interest, at eight per cent. per annum, payable in the city of New York; and also upon the receipt of the money, to execute a mortgage to secure the entire debt upon real estate in Alabama. The Bank acceded to the proposition, and appointed an agent to execute it on their part. The contract was executed by both parties; the Bank delivering the money, and Mr.

H. executing his bond and mortgage in Mobile: *Held*,—First—that the proposition made in Philadelphia was not the contract of the parties, but a proposal to make a future contract, which was afterwards executed in Mobile, and which must be considered as the place of the contract.

Second,—that as no intention appeared to violate or evade the usury law of New York, the contract, though the money was payable there, was not void, notwithstanding, by the law of that State, all contracts for the payment of money, reserving a higher rate of interest than seven *per cent. per annum*, were declared invalid.

Third,—that the mortgage given to secure the payment of the debt, could be foreclosed in Alabama.

2. The proviso to the act of 1818, restraining Banks in their loans, and discounts, to six *per cent. per annum*, is obsolete.

3. A foreign corporation, exercising one of it scorporate functions by the comity of this State, within its limits, must conform itself to our laws. A prohibition in the charter, that it shall not, within the State of its creation, take more than six per cent. *per annum*, on its loans or discounts, does not follow it into a foreign State, by whose comity it is permitted to make contracts.

4. H. made his will, containing the following clause: "For the purpose of having my estate properly settled, and administered, during the minority of my children, I do hereby appoint my dear wife, Anne, my sole executrix, and I do bequeath and devise the same, both real, and personal, to her, in trust, with full powers to sell, either at public, or private sale, all, or any part thereof, and the proceeds to re-invest, and re-sell, at her discretion, for the purpose of paying my debts, and legacies, or for a more advantageous investment; and good and sufficient deeds and conveyances to make therefor. It being my intention, and will, that my estate shall be kept together, and held in common, for her benefit, and that of my children, until they shall become of age respectively; at which time, and as soon after, as any one of them comes of age, he, or she, is to receive their proportion, it being always understood, that my wife is to receive an equal proportion of my estate, she, and they, having share, and share alike." *Held*, that this was a devise in trust to the devisee, of all the estate, real, and personal, in her individual character, and not as executrix: and that her refusal to qualify as such, did not affect the trust.

5. The office of the codicil, is to explain, add to, or subtract from the will; the will, and codicils, if there are more than one, constitute but one instrument.

6. Where a devisee in trust, to sell and dispose of the real estate of the testator, upon the consideration of the payment by a mortgagee of the testator, of a sum of money, by deed, "acknowledged, remised, and forever quit claimed, all the estate, right, title, interest, use, trust, property, claim, and demand whatsoever, at law, as well as in equity, in possession, as well as in expectancy, all and singular, &c." describing the mortgaged property, which conveyance was made to the mortgagee: *Held*, that this was a conveyance of the equity of redemption, being made after the mortgage was forfeited.

7. A sale made of land by a devisee in trust, is not vacated, by the estate of the testator being afterwards declared insolvent, though the administrator might be entitled to the proceeds, for the purpose of distribution among the creditors.

8. Although a mortgagee may have purchased in the equity of redemption, he has the right to apply to a Court of Chancery for a foreclosure, and to quiet his title, as a Court of Chancery always looks with suspicion, upon such transactions. To such a bill, the administrator, if the estate has been declared insolvent, is a necessary party, to enable him to show, if he can, that the equity of redemption, has been purchased at too low a rate, or a fraud in the sale.

9. In such a case, if there is no suggestion that the mortgaged property will sell for more than the mortgage debt, the complainant may take a decree for a strict foreclosure.

10. It is no objection that a trustee and his *cestui que trust* unite in the same bill: therefore, where trustees filed a bill without disclosing the beneficiary, and afterwards a supplemental bill, disclosing the fact that they were trustees for the United States Bank of Pennsylvania, and praying that it be made a party complainant to the bill; and also an amended supplemental bill, disclosing that the Bank had gone into liquidation, and that certain persons were assignees of the Bank, and praying also that they may be made parties complainant: *Held*, that all these persons constitute in law but one, representing the interest of the Bank.

Error to the Chancery Court of Mobile.

The original bill in this cause, was filed by Joseph Cowperthwaite, Thomas Dunlap, and Herman Cope, to foreclose a mortgage executed by Henry Hitchcock, upon certain lands in Mobile, to secure the payment of a debt due them of six hundred and twenty thousand, five hundred and thirty dollars, ninety-six cents, with interest at the rate of eight per cent. per annum, from the 1st March, 1838. That Hitchcock has departed this life, and devised all his estate, real and personal, to his wife, Anne Hitchcock. That by a deed made on the —— day of ———, 1840, she remised, and released, to the complainants all her legal and equitable title to the mortgaged premises, and put them in peaceable possession thereof. That Isaac H. Erwin, has been appointed administrator of the estate of H. Hitchcock, and has, or may pretend to have, some right to redeem the said mortgage. The prayer of the bill is, that he be made a party to the bill, that unless the mortgage debt be paid, the mortgage be foreclosed, &c.

At a subsequent term leave was given to make new parties, and to amend generally, and the complainants filed a supplemental, and amended bill, in which, after reciting the original bill, they state, that they are trustees for the president, directors, and company of the Bank of the United States, and pray that

the said president, directors and company, may be made complainants jointly with them. That the original bill was filed amicably, with an express agreement between complainants and the agent of Anne Hitchcock, that they should, under a decree of the Court, be put in peaceable, and quiet possession of the mortgaged premises. That during the life time of H. Hitchcock, and after the forfeiture of the bond, and mortgage, a bill was filed by them to foreclose it, to which he filed the plea of usury. That whilst the bill was pending, and the plea undecided, and whilst Hitchcock was engaged in a negotiation with them for the payment of the debt by a transfer of real estate, he died, making his wife, Anne Hitchcock, his executrix, with power to pay his debts, by a public, or private sale, of his real or personal estate.

That the mortgaged property was almost without exception, improved, and the rents estimated at about fifty thousand dollars per annum. That to obtain possession of the property, and avoid the delay attending the litigation of the plea of usury, Herman Cope, one of the complainants, and as the agent of the Bank, came to Mobile, for the purpose of negotiating with the representatives of Hitchcock for the possession. That he had many interviews with one James Erwin, the brother of Mrs. Hitchcock, on the subject of such settlement, he representing himself as her agent, and fully authorized to make such arrangement. That said Erwin represented, that the estate was largely insolvent, and that there were creditors to a great amount, wholly unprovided for. That these claims could be all paid, by the sum of one hundred and fifty thousand dollars. That upon the payment of that sum of money, for these purposes, the Bank should enter into the premises by a conveyance from the devisee, and should enjoy the same without let or hinderance from the representatives of H. Hitchcock. That the bill filed by the Bank against H. Hitchcock should be abated. That the devisee should decline to take upon herself the execution of the will, but that a friendly administrator should be appointed, who would acquiesce in the final adjustment.

That confiding in these representations, he paid into the hands of James Erwin, the said sum of one hundred and fifty thousand dollars, to be applied by him to the payment of the

unsecured debts of H. Hitchcock, and the devisee, by deed of release, conveyed to complainants all her legal and equitable estate in the premises; and received from them, a release of all demands against said Hitchcock's estate; and supposing themselves in virtue thereof in possession of the premises, they filed the original bill.

That James Erwin, some time before the negotiation between him and complainant Cope, had purchased at sheriff's sale, under an execution, as the property of H. Hitchcock, eight stores, (included in the mortgage) at fifty dollars, and took the sheriff's deed therefor—that said stores are estimated in the mortgage deed at two hundred thousand dollars, and as security for that sum, were accepted by the complainant—that after the said agreement was concluded on, and the money paid, said Erwin agreed to give complainants, as one of the means of quiet enjoyment, and possession, of the premises, whatever title he had acquired by his purchase—that said Erwin desired the terms of the negotiation to be concealed, that he might be able the better to arrange the payment of the debts of H. Hitchcock.

That Isaac H. Erwin was appointed administrator of H. Hitchcock, and instead of carrying the agreement into effect, has in every way endeavored to thwart it, by leasing out the premises, and by publicly advertising that complainants were not in possession of the premises, &c. The bill also makes Anne Hitchcock, and her children, the heirs of H. Hitchcock, parties to the bill. On motion, and upon affidavit, the Court granted an injunction restraining Isaac H. Erwin, administrator, from intermeddling with the mortgaged premises, or the rents thereof, and also appointed a receiver.

The complainants filed a second supplemental and amended bill, repeating the charges more specifically—charging also, that Isaac H. Erwin acquiesced in the agreement, made with his brother, as agent of Mrs. H., but delayed the execution of it under various pretences, and finally made another demand of the Bank as the price of his acquiescence, &c. That the original debt due from H. Hitchcock was $520,530 96-100, and that the further sum of $100,000, was by the Bank advanced to said Hitchcock, to be by him expended in improvements upon the mortgaged property, under the direction of an agent of the Bank, and that it was so expended.

That since the filing of their bill, they have conveyed all their interest in the aforesaid mortgaged premises, to James Dundas, Mordecai D. Lewis, Samuel W. Jones, Robert L. Pitfield, and Robert Howell, and pray that they may be taken and considered as joint complainants, &c.

To this bill, Isaac H. Erwin, administrator, with the will annexed of H. Hitchcock, demurred.

Mrs. Hitchcock, by her answer, denies any personal knowledge of the indebtedness of her husband, to the Bank, but adopts the answer of her husband to the bill filed against him, as containing a true statement of the facts. She admits the execution of the mortgage to the Bank, and that she joined therein, but whether she thereby released her dower, or not, does not know.

She admits, that under the belief, that as devisee in trust she had the right to do so, she executed to the complainants the deed referred to in the bill. The sole consideration of said sale, or release, was the indebtedness, or supposed indebtedness, of her husband's estate, she received no money from the complainants, but supposed it was a compromise. That within the time prescribed by law, she renounced all benefit under the will, and elected to take such interest as she was entitled to by law—that in relation to the $150,000 paid James Erwin, she does not know what understanding existed, between him and complainants, except that Erwin informed her, he received it in payment for eight store houses. No part of the money ever came to her hands, to appropriate to her own use, or to the payment of her husband's debts.

Isaac H. Erwin also answered the bill, and insists by his answer, that the original bond and mortgage were void. That as Mrs. Hitchcock had not qualified as executrix, she had no interest to convey by the deed. That as she had a mere naked legal right, her sale passed no interest. That said sale was invalid, because the proceeds of the sale, were not appropriated in payment of debts.

The bill was also answered by the guardian *ad litem* of the infants.

The record, consisting of upwards of five hundred large folio pages, contains a vast amount of testimony and documentary evidence, which it is impossible to make even an ab-

stract of; such of it as is important to a proper understanding of the case, will be found embodied in the opinion of the Court.

The Chancellor gave an elaborate opinion upon the case, in which he attained the conclusion—that the Bank had power to make the contract of loan with Mr. Hitchcock, in this State —that the contract was made in this State, and that the bond, and mortgage, were valid—that Mrs. Hitchcock, as devisee, had power to convey the lands, and that her conveyance, pursuant to the agreement made with the agent of the Bank, by her agent, James Erwin, was binding on her, and the heirs, and personal representatives of Hitchcock; and that therefore, the Bank, might have either a strict foreclosure, or sale of the premises at its election. The complainants elected to take a strict foreclosure.

From this decree the defendants prosecute this writ, and assign for error:

1. The misjoinder of parties.
2. The omission of necessary parties.
3. The supplemental bill was not authorized by the leave to amend.
4. The original and supplemental bills do not contain matter of equity jurisdiction.
5. In overruling the demurrers to the bill.
6. In admitting the Bank of the United States a party, when not made so by the second bill.
7. In appointing a receiver.
8. In bringing the infant heirs before the Court, by order of publication.
9. In examining H. Cope, one of the complainants, as a witness.
10. In ordering to attorn the receiver.
11. In granting the injunction against I. H. Erwin.
12. In refusing to modify it.
13. In not dismissing the bill on demurrer.
14. In the decree rendered.

Stewart, for plaintiffs in error. The plaintiffs rely on the following propositions to defeat the bill of the complainants:

1. The bill is defective in respect to the complainants. It

is uncertain who the complainants are, and this uncertainty is fatal. Are Cowperthwaite, Dunlap and Cope, parties, complainants or not? It can be shown from the bill that they are, and it can be shown that they are not.

The allegations are several, and not joint. Some are made by one party, and some by another; this cannot be done on a joint bill.

Parties are retained before the Court as complainants, jointly with others who have no interest.

There is a change of parties complainants; those who filed the bill are out of it, and others substituted.

A title acquired after suit brought is relied on.

The bill presents an alternative right, in one or the other complainants; this cannot be sustained.

As to the uncertainty of complainants, and joining them, and transfer of right pending suit, 2 Paige, 450; 1 Hopkins, 555; 4 Russell, 242, 244, 225; 3 Cond. Eng. Ch. Rep. 651-2, 643; Edwards on Parties, 14, 229; 2 Maddox Ch. Rep. 466; 1 Atkyns, 291; 2 J. Ch. Rep. 245; 1 Marshall, 594; 2 Dickens, 707; Story's Eq. Pl. 155 to 163, 147 to 153.

2. There is no equity jurisdiction shown by the bill, and it is bad on demurrer.

If the allegations of the bill are true, the complainants have the fee simple title, and the remedy is by ejectment.

The bill shows a void contract, and which no court of law or equity could enforce.

The bill shows a fraudulent combination against the heirs and creditors, administrators and legatees, and is in fraud of the laws of descent, distribution and rights of creditors.

So far as the mortgage is concerned, the bill shows a severance of the debt from the title to the land, the land being conveyed to Dundas, but the bond not being assigned.

The bill shows a title obtained from Mrs. Hitchcock, by a breach of the trust by her, and being claimed under a breach of the trust it is void.

The title of the complainants is shewn, by the bill, to be a void one.

The bill is not sustainable, as a bill to foreclose, because it does not show a case in which there is a right to redeem. It is not allowable to offer, gratuitously, the privilege of redeeming,

where the right does not exist, and make such an offer the foundation of a right to file a bill to foreclose, else a party could always, in every case of a contested right, file a bill, offer to his adversary the privilege to redeem, where the price was of equal value with the land, and thereby, on a failure to redeem, obtain a decree against his adversary, barring all title, and cut off the adverse title of infants, &c.

The bill cannot be sustained on the ground of quieting title; the title has never been tried at law. If this case could sustain such a bill, any case could, where there was a contested title.

Nor is it sustainable on the ground of restraining waste; no such case is made.

Nor is the pretext to restrain multiplicity of suits better maintained.

3. The bill shows no cause of action against Mrs. Hitchcock, and she is improperly made a defendant. She has violated no contract made by her.

Her contract, so far as she has made any, is executed, and all the rights which such contract secures, are enjoyed by the complainants, and she has not disturbed them in any manner. Why then file a bill and seek a decree against her?

Mrs. Hitchcock is no party to any disturbance made by Isaac H. Erwin, and has no connection with his acts.

The right of dower of Mrs. Hitchcock, is not put in issue by the bill, nor is it sought to be subjected, and it cannot be sought to be barred by surprise, and by claiming it after decree, as barred by the decree, when no allegation in the bill is made on the subject.

4. The bill cannot be sustained against the heirs of Henry Hitchcock.

They are no parties to the disturbance of Isaac H. Erwin, and that cannot be made the pretext of a bill to bar their rights.

They cannot be barred of their adverse title, by a bill, with a voluntary offer to allow them to redeem, when it is not admitted that they have a right to redeem.

Their title to land cannot be litigated, on a bill to foreclose, which denies their right to foreclose. The bill shows a fraud as against them.

Their adverse title cannot be tried on a bill, nor barred, nor defeated. They have a right to try it at law. [6 Paige, 637.]

Equity has not jurisdiction to try adverse legal titles on a bill, and cannot, on a bill to foreclose, forestall adverse titles.

5. The contract made in Philadelphia, between the Bank and Henry Hitchcock, and which provided for the execution of the bond and mortgage, was one unauthorized by the charter of the Bank, and was void.

This contract was made in Philadelphia, and is within all the prohibitions of the charter. It secures more than six per cent. interest, and this is contrary to the express restriction of the charter. And it is contrary to the usury laws of Pennsylvania.

Though the general usury law of Pennsylvania merely affixes a penalty for the taking of usurious interest, a corporation cannot say it will violate the law, and incur the penalty, because the corporation is the creature of law, and it has no creation for the purpose of violating laws; in such case its contracts are void, for want of power to contract—not like the case of individuals.

The contract derives no aid from the circumstance that the money is stipulated to be paid in New York, because the law of New York, which is the place of payment, prohibits such a contract, and makes it void.

It derives no aid from the circumstance, that lands in Alabama were to be mortgaged; that is but a cumulative security. Nor because a bond was to be made in Alabama, because that bond was to be a void bond, payable in New York, where, by law, it was made void.

Nor can the contract be maintained because the debt was originally due in Alabama, even if that were true, because the contract is made in Philadelphia. But in point of fact, one half of the debt was due and payable in New York. And large sums were due in Philadelphia. It is not said where they were due, and the presumption is, they were due in Philadelphia, as they are there stipulated for, and nothing said to the contrary.

The stipulation for the loan of money, to be laid out in improving real estate, in Alabama, is not warranted by the charter.

A corporation cannot, by a contract, violate its charter, because it cannot make a void contract; not because the contract is void, but because no contract is made, as it can make only lawful ones. And when an illegal contract is attempted, for the want of power in the corporation to make it, it fails, and no right whatever is created; and the good cannot be separated from the bad, and there can be no such thing as a contract, which shall stand, though a penalty be incurred.

As to the powers of a corporation—Angell on Corporations; 8 Ohio Reports; 9, Mass. Rep. 52; 4 Ala. Rep. 558; 13 Peters' Rep. 587; 1 Hall's N. York Rep. 480, 555-7; 2 Randolph, 109; 2 Peters, 527; 7 Wendell, 31; 4 Wheat. 518; 2 Cranch, 127; 4 Peters, 152; 1 Stewart, 299; 14 Peters, 129; 4 Peters, 168.

6. The bond and mortgage made in Alabama, are void. They were made in pursuance of, and to carry out, a contract which was void, unauthorized by the charter, and in violation of a statute, and being made to carry out an illegal contract, they are void also.

They are expressly made payable in New York; the law of New York governs their validity, and they are void, because they violate the usury laws of New York, which declares them void in toto.

They are made by Hitchcock, in favor of a party claiming the right to contract under a foreign statute, contrary to the laws and policy of Alabama, and she is not bound to enforce them.

Alabama, under the laws of comity, and, indeed, in every case, has the power to construe the charter for herself, and is not bound by the construction of any other State, and will not give force to a mere implication, the result of which would be, that the corporation would have more power abroad than at home.

The restrictions imposed on the Bank at home, will be equally held as restrictions on her powers in Alabama, and she must be restricted to six per cent by her charter. Besides, the law of Alabama, in relation to Banks, restricts even the Alabama Banks to six per cent. interest.

Though the statute of Alabama does not, by its very letter, bring the United States Bank positively within its terms, so as

to restrain it by positive statute from taking eight per cent. in Alabama, still it is sufficient to indicate what is the policy of Alabama, so as to govern its comity in this respect.

The transaction is a *loan* in substance, and secures a profit for the use of money. The loan is not like a mere forbearance, which can terminate the period of the running of the interest, by payment, at any time. It is a contract which secures the rate for a fixed period, and the rate is positively secured.

Where a contract violates a statute it is void—5 Barn. & Ald 335; 7 Com. Law, 121; 17 Com. Law, 255, 256; 12 Ib. 222; Chitty on Contracts, 228, 217, 231, 232; 4 Halstead, 352; 5 Ib. 87; 2 N. Hampshire, 517; 3 Halstead, 54; 1 Taunton, 136; 14 Mass. 322; 17 Ib. 281; 8 Cowen, 20; Holt's N. P. Ca. 435; 3 Starkie, 61; 11 East. 300; 1 Brod. & Bingh. 447; 2 Term, 610; 2 Bos. & Pul. 130, 374; 3 Vesey, 612; Bulstr. 38; Hobart, 72; Dyer, 356; Park on Insurance, 232; 3 Bos. & Pul. 35; 1 Ib. 272, 264, 340; 6 Term, 723.

Any prohibition is sufficient, and it makes no difference whether it be by penalty or not—Chitty on Contracts, 232; 17 Mass. Rep. 281; 7 Wendell, 280; 2 Peters, 527; 1 Maule & Selwyn, 597; 14 Johns. 273; 20 Johns. 397; 7 Com. Law Rep. 121; 17 Ib. 355; 12 Ib. 222.

The plea of performance governs the contract as to its validity and construction—Story's Confl. Laws, § 280, 287, 292, 293, 296, 304; 2 Kent's Com. 460, 461; 9 Porter, 10; 13 Peters, 65; Minor's Rep. 388, 14 Peters, 129; 4 Porter, 128; 20 Johns. 202; 17 Ib. 519; 10 Wheaton, 383; 6 Peters, 172, 202; 7 Peters, 435; 2 Johns. Ch. Rep. 355.

7. The Philadelphia contract, and the bond and mortgage made in pursuance thereof, are all payable in New York, and void by the laws of New York, which govern the whole contract.

The New York interest law, avoids all contracts for more than seven per cent.

By the laws of New York, the principal as well as the interest is forfeited.

The debt governs the mortgage, as to its validity, because the debt is the principal, and the mortgage is the incident.

The legal policy of Alabama is to restrict *Banks* to six per

cent. interest—Const. Ala.; Clay's Dig. 284; 1 Stewart, 299; Clay's Dig. 590, § 4, makes all usurious bonds void.

An usurious security, and every thing which is a furtherance of it, is void—2 Peters, 527; 9 Mass. 49; 1 Hall's N. Y. Rep. 546-7, 553; 8 Term Rep. 390; 20 Johns. 285; 10 Ib. 195; 3 Term Rep. 537; 2 Starkie's Rep. 211; 6 Cranch, 199; 6 Wheaton, 593; 2 Randolph, 465; 19 Johns. 1; 1 Wendell, 56; 2 Cowen, 678, 712; 3 Wendell, 574, 582; 10 Wheat. 367.

There is no distinction between lending and discounting—5 Law Library, 59; Comyn on Usury, 156; 1 Hall's N. Y. Rep. 556-7; 6 Cowen, 294; 2 Peters, 533, 537, 538.

As to the hazard of the debt—5 Com. Law Rep. 15; Comyn on Usury, 39.

8. The loan of the money to improve the real estate creates no lien on the property. The corporation has no authority to do so by its charter.

The loan was under a special contract, which was usurious, and it must rest on that contract, and cannot be separated from it.

It was in violation of a statute law, the law of the charter, and a violation of a statute law places it on ground different from the violation of the common law, it makes all void.

A contract is an entire thing, and cannot be separated. This was connected with other matters of unlawful stipulation.

The bill is not framed so as to assert such lien, if it did exist. Nor are the proper parties here to try it. Those who did the work, and were not paid, would be preferred, and they are not made parties.

9. The contract being void, it cannot be purged by restoring part of the money, and if it could, the money is not restored to the proper party.

Though a new contract, free of usury, would be valid, it must be a new one, and all the old securities or contracts must be cancelled and destroyed.

If it could, the money must be paid to the proper party, *bona fide*, and not fraudulently paid to a third person. And such new contract must be made with a party who has authority to make such new contract.

If the contract be void in part, it is void for the whole—1 Com. Law Rep. 264; 1 Hall's N. Y. Rep. 553; 5 Taunton,

780; 8 Johns. 197; 20 Johns. 285; 8 Term, 390; 9 Mass. 55; Cro. Jac. 508; 1 Term. 201; 4 Campbell, 157.

That the contract is void, though not so expressly declared by statute—2 Peters, 527; 8 Ohio; 13 Connecticut Rep.; 17 Mass. 281, and authorities cited.

10. Taking the deed to Cowperthwaite, Dunlap & Cope, does not help the Bank. It was a device merely, and the Bank cannot do indirectly what it cannot do directly. [2 Cowen, 711.]

11. If the mortgage was good it cannot be foreclosed, because it is merged in the title now held by the *complainant*, and the debt is *extinguished*, and it can no longer be considered as a mortgage to be foreclosed.

By the contract with Mrs. Hitchcock, the bond debt, and all the bills and notes on which it was founded, were surrendered to her, on the 10th February, 1840, in consideration of delivery of possession by her.

The land is conveyed by Cope, &c. to Dundas, in fee simple. But the debt, or bond, is not *assigned* to them, *and could not be*, because it was previously released and cancelled. There is, then, no pretence that Dundas, &c., have a title which can be foreclosed as a mortgage. They have a fee simple, or no title, and the redress is at law.

Banks are bound by the statutes against usury—3 Peters, 42, 36; 9 Mass. 49; 9 Peters, Waggoner v. B'k U. S.; 5 Randolph, Stribly v. Bank of Valley; 11 Wheat, 412; 15 Johns. 358, 381; 13 Conn. 249; 12 Peters, 135; 2 Hill, 267. And the policy of the law is to watch them narrowly, 2 Cowen, 755.

Release of the debt is a release of the mortgage—1 Powell on Mortg. 144, 145, note 1. And where the debt and mortgage are separated, the mortgage becomes void. Powell on Mortgages.

Taking a mortgage in another State does not change the contract. The debt is the principal, and the mortgage is but the security and incident—Story Confl. Laws, 287; 10 Wheat. 367; 2 Vernon, 395; 2 Atkyns, 382; 2 Kent's Com. 460.

The residence of parties is never taken into view, in construing contracts, either in England or America—Story's Confl. Laws, § 279; 3 Conn. Rep. 253; 2 Har. & Johns. 193, 228.

12. The will of H. Hitchcock, gives a power merely, but does not devise.

The will which devised, was made long before the testator's death, and such a will does not pass after acquired lands.

The codicil last made, *reduced* the authority to a power merely, and extended the power to after acquired lands.

The codicil controls the will and destroys the devise, and qualifies it so as to leave a power merely.

It is not shown that these lands were acquired by Hitchcock before the date of the *will;* this is not charged in the bill, nor proved, therefore it does not appear they are *devised lands;* and there is no showing of title in Henry Hitchcock, before the making of the mortgage.

13. The devise to Mrs. Hitchcock was made to her as executrix, and is connected with her administration of the estate, and she takes as executrix, and not as trustee. Without qualifying, the trust does not operate. Her renunciation of the office defeats her title, *ab initio.*

A codicil controls the will, and after acquired lands don't pass by a will. The fourth codicil reduces the devise to Anne H. to a *power*—Butler v. Leavens, 8 Porter.

The devise attached to the office of executrix, and not to Mrs. H., independent of the office of executrix—1 Lomax on Ex. 364, 361; 11 East, 288.

In England, executors can act before probate, and his acts are valid; not so here—he must give bond. The title of the devisee in England, does not require probate, as to land. It is held by the *will* alone, which can be proved on an ejectment, as a deed or title. Not so here. Probate is necessary to a will of lands, and County Court has jurisdiction as to probate of lands. 1 Lomax on Ex., 82, 83, 86, 87; 4 Munford, 200.

Renunciation of devise avoids it, and puts the heir in possession, by descent, by relation back to time of death—1 Lomax on Ex. 361, 362, 83; 14 Vesey, 434; 3 Lomax 117, No. 21.

All devises are void as against creditors, and against the administrator, when the personals are exhausted, whether it be a devise, a trust, or any other. All must yield to the title of the administrator, like bequests in England, because placed on the same footing—Clay's Dig. 191, § 1, lands charged by law; 192, § 2, where estate insolvent; 224, § 16, § 20, Petition for sale; 220, §§ 1, 2, 3, bond required; 226, § 27; 197, § 27; 199, § 2; 598, § 14.

14. If Mrs. Hitchcock was a devisee under the will, it was a devise in trust, and for all the creditors and legatees.

The terms of the devise are, that after the payment of all just debts, she shall pay legacies out of the proceeds.

Just debts only were to be paid, and afterwards legacies.

Usurious debts are not just debts, and cannot be recovered against the rights of the heirs and legatees.

Even among just debts, no one could claim precedence over others.

15. The devise is defeated by the appointment of an administrator, the insolvency of the estate, and petition for order of sale of lands.

Lands are here legal assets, as well as personal property, after the personal property is exhausted. The law subjects them, independently of the will of the testator. And the right of the administrator over them, is paramount to the will of the testator, the law compels their application to pay debts.

No devisee can acquire a title without the consent of the administrator; like chattels real, lands are assets when necessary, and are put on the same footing by our laws.

The title of the devisee, like that of the heir, is divested by relation back from the date of the decease, when required to pay debts, and all intermediate conveyances, by the heir or devisee, are avoided.

There cannot be two representatives of the deceased, with power to recognize or pay debts, because no such thing exists in this State, as equitable assets. The whole estate must be settled in the Orphans' Court, by the administrator, and that Court has jurisdiction of the whole assets.

An administrator could not, by our law and decisions, sell the land, and pay the mortgage debt. He must sell the land subject to the incumbrance.

From the moment the administrator petitions the Orphans' Court for the sale of lands, his right springs into active existence, and the title of heirs and devisees must yield.

Devises are void when they contravene the policy of the law, and fail when they become unlawful. Powell on Devises, 426, 434, 443, 471; Sugden on Powers, 106.

As to the power of executors—1 Lomax Ex. 82, 219, 220, No. 5; 3 Stewart, 489; 2 Porter, 33; 3 Porter, 221; Sugden

on Powers, 106; 8 Porter, 394; 1 Ohio, 101; 1 Yeates, 422; 3 Lomax Dig. 272 to 276, 278; 3 Leigh, 12; Powell on Devises, 426, 434, 471.

An executor with power to sell cannot exchange. 1 Ohio Rep. 104.

In Alabama, an executor has no power before probate—3 Stewart, 489; 1 Lomax, 83; 4 Munford, 194.

An executor or administrator can make no contract to bind the heirs—2 Porter, 33; 3 Porter, 221.

The heir may resist the sale for the payment of unlawful debts—2 Ala. Rep. 660. May shew debt barred.

16. The deed made by Mrs. Hitchcock to the Bank was a breach of the trust, created by the devise. Because it was a void debt which was paid. Because one single debt was paid, to the defeat of all others. Because a right worth at least $150,000 was released, without any benefit to the estate, but by placing the funds in the hands of a stranger, from whom the heirs, legatees and creditors have no security. Because it was an attempt to conceal that fund, so that it could not be reached, and the Bank lent its aid to this purpose. Because that sum was not the full value of the equity of redemption. Because the will gave the power to *sell*, but not to release and abandon, and the power must be strictly pursued. Because it was expressly agreed Mrs. Hitchcock should not qualify.

The party receiving the deed had full notice of all this illegality, and even if they had not, it would not be material. A party dealing with a trustee, must look to the power, and must even see to the application of the purchase money.

That the deed from Mrs. H. is a breach of trust, see authorities in the printed brief of Mr. Yerger.

As to disposing of the money in the hands of the receiver—1 Ala. Rep. 109.

17. The agreement, as set out in the bill and proof, and relied on, was void, as against the administrator, the heirs, and Mrs. Hitchcock, for fraud.

Mrs. Hitchcock received nothing, and there is no proof that she knew that any money passed.

Mrs. Hitchcock is in no manner connected with the contract made with James Erwin.

The complainants are estopped from saying they contracted

with her, or that they paid her the $150,000, because the contracts are exhibited by *three deeds*, and they are conclusive of the facts.

The deed signed by Mrs. Hitchcock, recites the consideration for it, as being, the sum of $773,452 23, which is the amount of the bond, the interest on it, and incumbrances on the land paid off. But excludes the sum of $150,000.

The deed of release, or receipt given by the *Bank*, where the Bank debt is surrendered, recites the delivery of possession of the property to the Bank, *excepting*, expressly, the eight stores, which are recited as in the possession of James Erwin.

The deed of the eight stores, from Erwin, recites $150,000 as the price of the sale of Erwin's rights, to the Bank, for those eight stores. Even according to their own account, they were paying, in full, James Erwin's debt, and concealing the fact, and the fund, from the other creditors and heirs.

Isaac H. Erwin was no party to that agreement, and knew nothing of it, and when informed of it, he offered to resign, but would not execute it. It would have been a violation of his duty to do so.

The heirs are not bound by that agreement, they receive no benefit, because the application of the money paid was not secured to be applied to the payment of debts, but was misapplied.

The arrangement for a friendly administrator, a friendly decree, and a friendly concealment of the facts, was a gross fraud, attempted to be used by the Bank to secure them a benefit, and no party to this record was a party to that fraud, except the complainants.

Chancery cannot be made use of to conceal frauds, and secure collusive agreements, nor can a Court be forestalled with impunity.

18. The dower right of Mrs. Hitchcock must be protected, and it must be so declared, to prevent surprise, even were the title of the complainants available.

The bill does not seek to condemn the dower right of Mrs. Hitchcock, it is not put in issue, and cannot be condemned by implication.

Dower is favored by the law, and never treated lightly, and never destroyed or impaired, except by express acts.

The making of Mrs. Hitchcock a party, was improper and unnecessary, and if to litigate her right of dower, is improper. The bill contains no averments putting it in issue, and no surprise will be permitted. Any decree on this bill, in any event, must be "*without prejudice*" to Mrs. Hitchcock's individual rights.

19. Mrs. Hitchcock is not divested of her dower in the land in controversy.

Her joining in the deed of mortgage was before the passage of the statute on that subject, and the effect of that deed, as to her, stood as at common law.

At common law, dower would not pass by the deed of the wife, she being a *feme covert*, and dower being an estate not in existence during the life time of the husband.

A dower right cannot be conveyed by joining in a deed made by the husband. There must be appropriate words in the deed to pass the dower right. It did not, therefore, pass by the deed.

The release of dower on the back of the deed, did not pass the dower, because there was no acknowledgment of that release, such as the statute required; the *acknowledgment* is of the *mortgage* deed, *jointly* made, by the husband and wife; but is *not of the release of dower*.

The deed of release made by Mrs. Hitchcock to the Bank, was in her fiduciary capacity, as a devisee of Hitchcock, and expressly made under the powers under the will. It purported, and was intended, to pass the right of the testator, and not her individual right.

The deed cannot be construed as her release of individual right by implication; no dower can be lost by implication.

The deed will be construed by the consideration. There was no personal consideration. The consideration was a release of the debt of the deceased, and was beneficial to the estate, not to her. Her dower was a title superior to that of heirs, legatees or creditors.

The money paid, was not paid to her, nor for her, nor under her control, if it was to pay debts with. Nor was the money paid for her private benefit, and she has no connection with that payment, nor James Erwin's acts, nor the promises of the Bank to James Erwin.

The individual release of Mrs. Hitchcock was not necessary to pay the debt, as the title of the deceased to the lands was, as it appears, of greater value than the debt.

The debt was extinguished with the means of the estate, that would have released the dower, if even it had been originally pledged.

A release of dower, or a mortgage, is not an absolute release; a discharge of the debt restores the dower right.

And a release of the debt, or purchase of the equity of redemption has the effect to restore the dower.

Where the widow relinquishes the provision made for her in the will, within one year after probate, it entitles her to dower. She did so. She had entered into no contract preventing her from so doing, and never received any thing for her dower.

17. The devise having failed of effect, by the non-acceptance of the executorship and renunciation thereof, or of the power to sell lands, the heirs are in by descent; and entitled to all the rents, until a sale, whether mortgaged or sold under order of the Orphans' Court.

18. The decree is improper in itself, even if complainants were entitled to a decree.

The Court cannot render a decree imperfect in itself, or in the alternative, and to become effectual by a declaration of record, to be made by one party in vacation.

The act of a party can never be a decree, or a part of a decree. The Court must pronounce its action upon the act of the party, and declare it to be a sufficient election.

The authority of the counsel to make the election, is not ascertained without an act of the Court. Nor does it appear who made it, nor by what authority it was made.

No absolute foreclosure can be decreed; there are infants concerned, and there must be a reference to ascertain how much is due, and how much, and what, shall be sold, and how sale shall be made.

The rights of infants must be saved; they may redeem when they come of age.

The terms of the mortgage require, that the Bank shall pay the previous incumbrances on the land, and that the first proceeds of sales shall be applied to pay them.

The rent or profits in receivers hands, are not applied in part extinguishment of the mortgage.

The bill is to foreclose a mortgage, and the decree treats it as a bill to try the title to land, and a recovery is had, and damages, or rents, from the day the plaintiff's title accrued.

No credit is given for funds belonging to the administrator, shown, by the proof, to be in the hands of the Bank.

The decree is confined to all the rights and claims of the complainants, and respects none of those of the defendants; even those admitted by the complainants contracts and proofs. Yet they are infants under the care and guardianship of the Chancellor.

The refunding bond required is too small, and is void, because taken before the decree was made. It is for less penalty, even, than the assets in the receiver's hand, and they are required to be immediately paid to the complainants.

Hopkins, for the plaintiff in error, in addition to other arguments on several points of the case, submitted the following:

The State of Pennsylvania for objects, which she deemed important, granted the charter of the Bank, and conveyed by it such a measure of power as her legislature thought would be sufficient to accomplish them. The Bank had no power, but that, which was granted or might be necessary to carry such power into effect. [Angel & Ames on Cor. 66, 67; 4 Ala. Rep. 558; 13 Peter's Rep. 587.] The section which prohibits the Bank from taking interest at a rate exceeding 6 per cent. per annum upon her loans and discounts in the State of Pennsylvania, contains a grant of authority to take interest at the rate mentioned upon such loans and discounts, and it is the only grant of authority upon the subject in the charter.

If to the power given to deal in bills of exchange, lend money, and discount bills and promissory notes, no express authority had been added to take interest on any of these operations, the Bank would have had no right or capacity to take more than the lawful rate of the State of Pennsylvania. In such a case the source of her authority to take any interest, would be in the grant of power to do the acts, upon which all persons in that State have the right to take interest, and in the

necessity to charge the lawful rate to enable her to carry into effect, the powers which were expressly granted by the charter. The implied power to take interest in the case supposed, would be limited to loans and discounts made in Pennsylvania. If the words in the charter limiting the Bank to 6 per cent. per annum on the loans and discounts she might make in Pennsylvania, had been omitted as to that State, the same limitation would be implied. The charter is a law of that State, and like her general law in relation to interest, and every other enactment of her Legislature, is impliedly limited to the territory, for which the State has power to legislate. It is contended for the defendants in error, that the forbearance of a debt is not a loan or discount. If this position be true, the Bank had authority to take or reserve interest at the rate of 6 per cent. per annum for the forbearance of a debt granted in Pennsylvania, because the general law of the State in relation to interest, allows this rate, and the power to take interest according to that law, would be implied in favor of the Bank, as it would be necessary to enable her to carry into effect, the powers, which were expressly granted by the charter. Upon a loan or discount made in Pennsylvania, the Bank had no authority to reserve the rate of interest of Alabama, by making the note or bill payable here. For granting in Pennsylvania a forbearance of a debt, the Bank had no power to reserve interest at a rate exceeding 6 per cent. per annum; if such forbearance be a loan—a higher rate of interest would be a violation of the charter, or if it be treated as something different, a higher rate would be a breach of the law of Pennsylvania against usury. Pennsylvania had the power to give the Bank capacity to act within the limits of that State, and to prescribe the extent of that capacity. If the charter had prohibited the Bank from doing any act beyond the territory of that State, any thing done by her in another State would be void. But although Pennsylvania had no power to authorize the Bank to exercise the power she derived from the charter in any other State, yet the exercise of them would be valid in any other State, the comity of which permitted it. From the power to deal in bills of exchange, and take a specified rate of interest upon loans and discounts made in Pennsylvania, the assent of that State must be implied to the exercise of the

powers granted by the charter wherever comity allows it. The charter does not prescribe the rate of interest which the Bank may take upon the loans and discounts she might make, or reserve upon a forbearance of a debt she might grant in another State. The Bank therefore had no power that was expressly granted, to take interest any where at a higher rate of interest than 6 per cent. per annum. The action of the Bank was intended mainly, to be in Pennsylvania, and no power can be implied in her favor, to be exercised in another State upon the ground, it is necessary to accomplish the objects for which she was established, that could not be exercised in the State which granted the charter; she had no power either express or by implication, to take upon a loan, or discount, or forbearance of a debt in Pennsylvania more than 6 per cent. per annum, and therefore had no power from either source to take a higher rate of interest in such cases any where. The powers, express or implied, granted by the charter, of which the right to take, or reserve interest, is a part, and which the Bank was authorized to exercise in Pennsylvania, and not prohibited from exercising wherever comity would permit, were thought by that State, sufficient for the accomplishment of the objects she had in view in establishing the Bank.

The validity of any act of the Bank in Alabama depends upon the comity of the State. Comity enables a corporation created by another State, to exercise here such of the powers, which were granted by the charter, as do not interfere with the policy or laws of Alabama; but comity does not and cannot make any grant of power to the corporation. If, by her charter, the Bank had no power to take more interest than 6 per cent. per annum, upon a loan, discount, or the forbearance of a debt, the exercise of comity here cannot give such power, or authorize her to take or reserve a higher rate of interest upon a loan made, or a forbearance granted in this State. The power which comity permits to be exercised, is such only as was granted by the State of Pennsylvania, in the charter to the Bank. Comity is nothing more than the recognition of the law of another State, and consequently of the power which the law or charter gave the Bank. [See 13 Peters, 590; Ang. & Ames on Corp. 206; 14 Peters, 122.] But for the existence of comity, no corporation which had not been created by the

Legislature of this State could exercise any power here. If the effect of comity were greater than I have admitted, power could be exercised in Alabama by a corporation, without any legislative grant of such power from this or any other State. Charters can neither be granted, nor amended, by the exercise of comity.

If the exercise of comity could give power to take a rate of interest which the charter did not, the Bank would obtain as many grants of power from comity as there might be States, in which she acted, and a different measure of power in relation to the rate of interest from New York, Alabama and Louisiana. The power in this respect, obtained from each of these three States, would be different and greater than that on the same subject, which was granted by Pennsylvania; the only State that ever determined it was proper to grant the charter, and what powers ought to be conveyed by it, to accomplish the objects for which the Bank was established by that State. If additional grants of power were the results of the exercise of comity, the powers of a corporation could never be ascertained from its charter. They would depend at any time, both upon the charter, and the laws of every country, where, with the permission of comity, the Bank was acting at such time. If her powers were ascertained from these sources, upon any particular day, the knowledge of them thus acquired would be no barrier against the enlargement of them. She might afterwards do business in some other State, where she could acquire, from the exercise of comity, greater power than she had before.

The measure of power granted by a charter cannot be diminished by the Legislature which granted it, without the consent of the corporation, unless the right to do so were reserved by the act of incorporation. All the corporate power the Bank had, was given and secured to her by a contract. The charter was a contract between Pennsylvania and the stockholders of the Bank, and that State was incompetent to do any act, which would impair any right the charter gave. Although all the corporate power the Bank had was placed by the inviolable character of the contract which conferred it, beyond the reach of the action of the legislature of Pennsylvania, yet the Bank would have no right to take, upon a loan

she made in Alabama, interest at the rate of 8 per cent. per annum, after this rate had been reduced by law to 6 per cent. The charter gives no power to take interest at the higher rate which has been mentioned, and Alabama was competent to reduce the rate. The reduced rate would be the same which is specified in the charter, and there would surely be no pretext for claiming a right for the Bank to take 8 per cent. interest on her transactions in this State, upon the ground that while the rate was 8 per cent. she had exercised the power in the name of comity to take it. But if the power to take 8 per cent. here, before the supposed reduction, had belonged to the Bank, it would be as inviolable and as perfectly protected against any alteration, as any other power of the corporation. According to the effect we ascribe to comity, the powers of the Bank would be at all times the same, whether in the enjoyment of the permission from comity to exercise them in all the States, or confined to Pennsylvania, which granted her charter, by legislative prohibitions in each of the other States, against the exercise of her power in any of them. As the charter was a contract with Pennsylvania, the power given by it could not be impaired without the consent of the Bank, but the other States could lawfully suspend or abolish the comity, which allowed her to exercise her powers within their territory. Upon any other principle than the one we maintain, to ascertain the powers the Bank may exercise in this and other States than Pennsylvania, her power, as to the rate of interest, for instance, that she may take, would be different in different States, and might be different in the same State at different times.

As the Bank derived no capacity from her charter to make a contract for more than 6 per cent. interest, the bond in this case, upon which interest at the rate of 8 per cent. per annum was reserved, is void.

An act of the legislature of the Territory of Alabama, which was passed on the 13th of February, 1818, authorized conventional interest at any rate, to which, parties to a contract might agree, and in the absence of a stipulation upon the subject, it prescribed 8 per cent. as the rate. In the act it was provided that nothing contained in it should be so construed, as to make it legal for *any Bank* to receive more than at the rate of 6

per centum, per annum upon its loans and discounts. [Toulmin's Dig. 143, 144.] By an act of the 17th December, 1819, the authority to take more interest than at the rate of 8 per cent. per annum, was revoked. [Toulmin's Dig. 444.] The prohibition against the receipt, by any Bank, of more interest than at the rate of 6 per cent. per annum, has not been repealed. By the authority of the legislature of Alabama, it was published as one of the laws of the State in 1833, in Aikin's Digest. [See page of the Dig. 226.] By the same authority it was re-published in 1843, as a part of the statute law in Clay's Digest. [See page of the Dig. 284.] At the date of the act of the 13th of February, 1818, The Planters' and Merchants' Bank at Huntsville, and The Tombeckbee Bank, both had charters. The legislature, when that act was passed, believed it was for the public good, therefore made it the law of the country, that *no Bank* should take more interest than at the rate of 6 per cent. per annum, while it was thought to be the best policy, and therefore authorized by statute, that persons who entered into contracts might take any rate of interest, upon which they agreed. The Planters' and Merchants' Bank of Mobile was established by an act of the legislature of Alabama, of the 8th of January, 1836. It went into operation and held the corporate powers which were granted by its charter, till the 13th of February, 1843. During the whole time it exercised its powers, it was prohibited from taking interest at a higher rate than 6 per cent. per annum. [Aik. Dig. second ed. 596; Acts of the General Assembly of Alabama, passed during the session of 1842–43; see pamphlet acts, 70.] While individual parties to contracts were authorized to take, or reserve any rate of interest upon which they agreed, Banks, (of which there were then two in the Alabama Territory,) were limited to 6 per cent. only. How much more mischievous than they were, would have been the consequences of the act of 1818, if the doctrine asserted by the defendants in error be true? A Bank confined by the policy and law of the State, that granted its charter to the same moderate but ample rate of interest to which our own Banks were limited, could, in doing business here, have set the provisions of our statute law in relation to Bank interest at defiance, reserved conventional interest at the rate of 120

per cent. per annum, and required that as well as the principal, to be paid at New York, or at her own door in Philadelphia. The enormous rate I have mentioned was frequently reserved by contracts between individuals, under the act of 1818. A grant of authority to take, or reserve interest, at a rate, at the bare mention of which, Pennsylvania, had she been asked to make it, would have been shocked, could have been acquired here from comity, if the doctrine affirmed for the benefit of the Bank, can be maintained.

The rate of interest which the stock Banks of Alabama had a right to take, has been constantly less since the act of 1818, than individuals have been authorized to accept or reserve. The three Banks which have been mentioned, were all subject, as long as they exercised corporate powers, to the restriction, from which the Bank of the United States claims exemption. Since the existence of the restriction, there has always been some Bank established by the authority of Alabama, subject to it. During the time in which the transactions occurred between Hitchcock and the Bank of the United States, the Planters' and Merchants' Bank of Mobile was bound by the restriction. The Bank of Mobile is subject still to the restriction upon all promissory notes she discounts, having less than six, or more than twelve months to run. Before the act of 1834, she was bound by the restriction in relation to the promissory notes she discounted, without regard to the time they had to run. [Clay's Dig. 130, § 18.]

Comity does not require of Alabama to permit the Bank, which is a party to this suit, or any other foreign Bank, to take a higher rate of interest than her charter authorized, or she would be entitled to in Pennsylvania, and higher also than stock banks of the State, were permitted to take when the Bank of the U. States reserved the interest she claims. The policy of Alabama, in regulating bank interest, and her law prohibiting the taking of more than 6 per cent. per annum, have both been violated by the Bank of the United States. The bond and mortgage in this case, are void, because the statute prohibited the rate of interest reserved in the bond and secured by the mortgage. Although the act neither inflicts a penalty nor declares a contract void, by which interest was reserved in disregard of the prohibition of more than six per

cent. per annum, yet such a contract is void, upon general principles. Against the prohibition, the Bank had no capacity to make a contract in Alabama, for interest, at the rate of eight per cent. per annum. [2 Peters' Rep. 527; 7 Eng. Com. Law. Rep. 121; 12 Eng. Com. Law. Rep. 222; 17 Eng. Com. Law. Rep. 355; 8 Ohio Rep. 13 Conn. Rep. 258, 280, 289; 17 Mass. Rep. 281; Chitty on Con. 232.]

As there was no capacity in the Bank to make a contract for interest at the rate of eight per cent. the bond is void for the part which relates to the interest, and being void in part, is void for the whole. [1 Com. Law. Rep. 264; 1 Hall's N. Y. Rep. 553; 5 Taunton, 780.]

The bond and mortgage are void, because they are usurious by the laws of New York, where the bond on its face is payable.

A loan made in Canada, for instance, where the rate of interest is six per cent. per annum, payable in England, where it is five per cent. only, will bear interest at the rate of five per cent. after the maturity of the note or bond, which was made as evidence of the debt. It would bear the English rate of interest, although the debt should be secured by a mortgage on real estate in Canada, or Louisiana, because it was payable in England. [20 Johns. Rep. 102; Story's Conflict of Laws, 242, 243, 244, 2d ed., and § 291, 293.]

If the loan made in Canada, be secured by a note payable in England and reserving interest from the date without specifying the rate, the holder of the note will be entitled to interest according to the English rate.

The interest in such a case, as well as the principal, is of the substance of the contract, and the whole contract, as well the part for the interest as that relating to the principal, is payable in England. The validity and extent of the obligation of each part of the contract must be tested by the law of England. Why is New York interest as damages allowed upon a note not paid when due, made here, and payable at New York, by which no interest, before maturity, was reserved, and none stipulated for afterwards. Because the whole contract is to be performed in New York, and the consequences of a failure to perform it, ought to be determined according to the law, in reference to which, the parties made their contract. That they made their

contract in reference to the law of New York, the note in such a case would prove.

If a note made in Alabama, were to reserve interest from the date, without specifying the rate, and make both payable in New York, the fact appearing from the note, that it was payable in that State, would prove that the entire contract was made in reference to the law of New York, and the law of that State should be resorted to, to ascertain the rate, as well as the validity of the reservation of interest.

If the parties to such a note took one step more, and specified the rate of interest which, with the principal, the note required should be paid in New York, there would be as much proof, and of the same kind, as there was in the other two cases, which have been stated, to show the parties made the contract in reference to the laws of New York, and the same legal principle that has been referred to, would require the validity of the rate of interest, which was reserved, and the effect of the reservation upon the whole contract to be determined by the law of New York.

In each of the three cases, which have been stated, there is proof of precisely the same amount and kind, to show that the parties in each case, made their contract in reference to the law of New York, and as in the absence of all other evidence, it must be acknowledged, it would be conclusive to prove that the two first mentioned notes were made in reference to the law of that State, no reason is perceived why it should not be permitted to prove the same fact, in relation to the last note.

If a note made in New York, and payable there, or if legally payable there, because it appointed no place for payment, reserved more than the legal rate of interest of that State, it would be usurious and void. The facts appearing from the note itself, that it was made there and not payable elsewhere, would be proof that it was made in reference to the law of New York, and upon such evidence, it would be held to be a violation of her law against usury, and therefore, illegal and void. As both the principal and interest due upon the bond to the bank, were payable in New York, the proof is as clear and strong as it would be in the last case mentioned, that the parties made the contract in reference to the law of

New York; and the interest being more than is allowed there, the contract is usurious and void. [Story's Conf. Laws, pages, 244, 250, 352, § 293, 294, 301, b. 301, d. 304, f.; 13 Peters' 67, 77, 78.] A promise in a note to pay interest from the date of it, at a specified rate, is an obligation, if one at all, to pay the same rate till the principal may be paid, or the contract merged in a judgment. If the principal, and a specified rate of interest be payable in New York, it must be determined accordingly to her laws, what is the effect of such a rate of interest upon the contract, and whether the rate specified can be legally required after the maturity of the note, and for a failure to perform what was contracted to be done in that State. Upon a note made here and payable here, in which a rate of interest was fixed and made to accrue from the date, interest according to the specified rate, could be recovered after a failure to pay down to the time of judgment. The recovery of interest would not be of the specified rate, in virtue of the contract until default of payment, and afterwards *ex mora*, till the judgment should be rendered, as if there were no contract to regulate the rate of interest from the maturity of the note till it was merged in a judgment; but all the interest that had accrued before the judgment, would be recovered in virtue of the contract, and according to the rate specified in it. That the rate which would be recovered in such a case, after the maturity of the contract, and till judgment upon it would not be "*ex mora*," is proved by this, that if the rate fixed were five per cent., five per cent. only till judgment would be recovered. But if a contract specified no rate of interest, the rate allowed upon one made and to be performed here, after maturity, and as damages for non performance, is eight per cent. The interest specified by the bond in this case is eight per cent. per annum. If it can be recovered at all, it must be recovered at this rate, from the time appointed by the parties for it to accrue, till a judgment or decree shall be rendered upon the bond. A judgment or decree for interest according to this rate, would be for more than the New York laws, against usury, allow. [20 Johns. Rep. 102.]

A note made in Alabama, and payable in Louisiana, might be valid, although it reserved from its date interest at the rate of ten per cent. per annum, (which is the highest Louisiana

rate,) till payment. In the absence of all other evidence than the note, it would be sufficient proof that the parties made it in reference to the laws of Louisiana, and upon such proof the note would be judged valid, because it would be shewn it was made according to the laws of that State. [Story's Confl. Law, 246, § 296.] The doctrine, that if both the law of the actual place of contract and of performance, be not violated, the contract is valid is modern, and has found as yet but few advocates, either upon the judgment seat or elsewhere. It seems to have no other foundation than the interest of creditors. If one were to become a creditor by a written contract, made in this State, by which his debtors acknowledged themselves to be indebted to the payee in the sum of ten thousand dollars, seven thousand dollars of which they promised, in the contract, to pay in New York, upon an appointed day, with interest at the rate of eight per cent. per annum, from the date of the contract, and the other three thousand, with interest from the same time, at the rate of ten per cent. per annum, was payable in Louisiana; if he secured the whole of the debt by a mortgage upon real estate in Alabama, and after default in payment, sued one of the debtors for both sums, and the interest, who should file a plea of usury, alledging that the contract was made in this State, and therefore the reservation of interest at the rate of ten per cent. per annum, upon the sum of three thousand dollars, was a violation of the laws of Alabama against usury, and the interest upon both sums usurious, as there was but one contract, which was corrupt in part, and void therefore, for all the interest; the creditor would be entitled to a verdict, upon an issue on the plea, if there were no other evidence than the written contract. The contract would be sufficient proof that the parties made the contract for the three thousand dollars and ten per cent. interest, in reference to the laws of Louisiana, where this part of the contract was to be performed, and where the interest at the rate of ten per cent. per annum, is lawful; and as no plea put in issue the validity of the obligation to pay interest at the rate of eight per cent. upon the $7,000 made, by the contract, payable in New York, no question could arise, in that suit as to the usurious character of the eight per cent. interest, because it was more than the laws of New York allowed. After such a verdict and judgment in his favor, the credi-

tor might sue the other debtor upon the same contract; if he did the defendant could not doubt his right to a defence. He might file a plea of usury, alledging that the $7,000 and the interest reserved thereon, were made payable in New York, whose laws declared any rate of interest exceeding seven per cent. per annum usurious, and made all contracts tainted with usury, void. According to the judgment of the Court against the first defendant, the second would have sufficient proof, the proof afforded by the written contract, to shew that the parties made the contract in relation to the $7000, and the interest, reserved upon it in reference to the laws of New York. He would therefore be able to shew, by the same kind of evidence, that had been held sufficient to prove in the first case, that the other part of the contract was made in reference to the laws of Louisiana, which allowed it, that this part of the contract was made in reference to the laws of New York, where such a rate of interest was usurious, and made the contract in which the interest was reserved, void. With such proof, and such a decision as to the effect of the evidence, his defence would seem to be impregnable. But according to the new international law, to which the defendants in error insist, the old must yield, the creditor would be entitled, in effect, to elect whether the law of the place where the contract was made, or of that where it was to be performed, should determine the validity of the contract, and the extent of its obligation. Guided by his interest, he would, in the last case, elect that his contract to pay $7,000 and interest, at the rate of eight per cent. per annum, in New York, should be governed by the laws of this State, where the contract was made. In the first case, the law of the place of performance was applied to the contract by which the creditor's interest was secured, but if that law would injure him, he may, according to the rule, take the benefit of the law of the place where the contract was entered into. He may, in such a case as the last which was supposed, disregard the proof that was deemed sufficient to shew the parties made the contract in reference to the laws of the place of performance, and would shew the same fact again, if the effect of evidence were allowed to be uniform. If proof that the parties made the contract in reference to the law of a particular place, be disregarded, why not give the debtor the right to elect between the *lex loci*

contractus and the *lex loci solutionis* instead of the creditor. His election dictated by his interest, would be as competent and credible proof against the evidence afforded by the written contract of both parties, as the creditors. [Story's Confl. Laws, 246, § 296.]

If a creditor were to take a note in his favor in this State, and secure the debt due to him by a mortgage upon real estate in Louisiana, with interest, at the rate of ten per cent. per annum, and the note was not payable in that State, the Courts here must hold it to be a usurious contract under our laws. A note bearing such a rate of interest, made in New York, not payable in Louisiana, but secured by such a mortgage upon real estate in Louisiana, would be a violation of the usury laws of New York. It is a singular specimen of comity to uphold a contract made here to accomplish an object in New York, which could not be attained, if the same contract had been made as well as payable there, and which could not be accomplished in this State, upon a contract made here, to secure the payment of more interest than the laws of Alabama allow. [Story's Confl. Laws, 238, §287.]

Dargan, with whom was Gibbons, contra. The first question is, where was the contract made in contemplation of law? We say in Alabama. This appears from the facts. Hitchcock is under liabilities in Alabama, either as drawer, indorser, or acceptor, of certain bills of exchange, held by the Bank of the United States. He resided in Alabama, and it was his only place of business. If the liability grew out of the drawing or indorsing of bills payable out of this State, his indebtedness arose in Alabama, on the failure of the parties anteriorly liable on the bills. If his liability arose from acceptances made in Mobile, there can be no question raised. Being thus liable for the debt in Alabama, he goes to Pennsylvania to negotiate for the extension of time on the debt, and there makes the proposition, which is accepted, and out of which the bond and mortgage come. What is this proposition? It is an offer to do something, *not in Pennsylvania, but in Alabama,* where the debt is payable, at that time. What is the ratification of it? An acceptance on the part of the Bank of the offer of securities to be executed in Mobile. It is the same thing, and no

more, as if Hitchcock had dated and written the letter in Mobile, and the Bank had replied, by instructing its agent, directing him to carry out the details here. If Hitchcock had treated directly with Poe, here, there could have been no pretence that the locality of the contract was not in Mobile; and yet, in that case, the transaction would have been virtually the same, for Poe's authority to make the contract, would have been derived from Pennsylvania; and the principal acts as much in Alabama, by his agent in that State, as though the principal were present there. And, discarding these views of the previous treaty between the parties, it is enough to say that the bond and mortgage are actually executed here, and they are alone the subjects of inquiry.

See for a case exactly in point, Chapman v. Robertson, 6 Paige, 627. This case, in fact, differs from the present in wanting the same evidences of the place of contract, which in ours arise from the debt having been incurred in Alabama, and the further advance being made in Alabama; but the locality of the mortgaged property is alone considered as a sufficient test.

The fact, then, being established that Alabama is the place of contract, let us inquire if the charter be violated? The alledged violation is of the 6th fundamental article: "The rate of discount at which loans may be made *within this commonwealth*, shall not exceed one-half of one per centum, for thirty days."

To this alledged violation there are two answers: 1. That this case presents no loan, or discount, but merely the taking of security on a debt already past due; except as to the advance of the $100,000 which will be presently examined.

2. That the contract being made in Alabama, it is not, in any case, within the restraint imposed, because that can only apply to operations within the commonwealth of Pennsylvania.

On the first it is only necessary to say, that to bring the present case within the restriction of the charter, a loan, or discount in the ordinary course of banking transactions, must be shown; the arrangement of delayed debts, and taking securities, after the manner of the present case, would not, if done by the Bank in Pennsylvania, be governed by the charter, but by

the general interest law of that State. [9 Wendall, 471.] As to the $100,000 advanced, that is no *loan* to Hitchcock; it appears on the face of the agreement, to be an advance by the mortgagee for the improvement of the mortgaged premises, and increase of the security; and as such could have been laid out by the mortgagee, if necessary, without the concurrence of the mortgagor, and equity would have allowed it, with interest, in an account for foreclosure, before the register. How can that be a loan to a man, which he is expressly forbidden to use as his own money, and which remains, in its disbursement, subject to the control and application of the supposed lender? For authorities as to the right of the mortgagee to be refunded for improvements, see 3 Powell on Mortgages, 956, note.

But it was part of the inducement to the Bank, and was to be expended for the benefit of both, by the agreement of both. [1 Powell on Mortgages, 313, note.]

2d. Be the contract what it may, the restriction of the charter does not apply, because the act is not done *within the commonwealth* of Pennsylvania. The Bank derives the power to make its contracts, not from the fundamental article under consideration, but from the previous section of the law, creating the corporation, and defining its powers. The article is merely a restriction, and, as such, must receive a strict and literal construction. Its character is wholly local, as appears by its very terms, and it leaves the power given by the charter thus: the contracts incident to a banking corporation may be made any where, subject only in Pennsylvania, to the rate of discount prescribed; and in other countries subject to the restrictions of such countries only. [13th Conn. Rep. 227.]

To the second objection—Is the contract void because against the general interest law of Pennsylvania? It is sufficient to say, that assuming the place of the contract to be Alabama, the general interest law of Pennsylvania, cannot apply to it, at all.

The third objection—Is the contract void because against the statutes of usury in New York?

There is no pretence that the contract was *made* in New York. The supposed violation must consist in the payment proposed to be made in New York. The objection rests on the general rule, that the statute of usury of the place of payment, must govern the character of the loan. The answer to

this is, that where the parties contract with reference to the laws of the place where the contract is made, and under such laws stipulate for a higher rate of interest than is allowed by the laws of the place of payment, such stipulation is valid, and the interest is is not usurious. That such is the law, see 2 Kent's Com. 260, et seq.; 6 Paige, 627; 20 Martin, 1; 9 Porter. 1; 13 Peters, 65; also, 520; 2 Atkyns, 382; Story's Confl. 252; 7 Paige, 616.

Fourth objection—Is the contract void because in violation of any law of Alabama?

There may be two grounds supposed to be intended—one, that we have taken more than eight per cent., because the advance was made in Alabama money; another, that we have taken more than six, against the third section of the interest law of 1818.

The first ground is completely swept away by the case of B'k of U. S. v. Waggoner, 9 Peters, 378.

To the second, the answer is, that the third section of the interest law of 1818, has no application to this case.

The first law is that of 1805—fixes six per cent., on bond or note, for money; if more be taken principal only shall be recovered. If taken by way of corrupt bargain, the person paying may recover principal and interest. That six per cent. allowed on bonds and notes, after payable. This law does not affect this inquiry, and is moreover repealed.

Next comes the act of 1818. First section, allows any rate of interest expressed in writing. Second, where no rate is expressed, eight per cent. to be allowed. Third—Provided nothing in this act shall make it lawful, for any Bank to take more than six per cent. on its loans and discounts.

Next comes act of 1819—First section, fixes eight per cent. Second section, fixes penalty. Fourth section, makes usurious bonds void.

The first section of the act of 1818, was repealed, November 22, 1819, and fourth section of 1819, repealed January 17, 1834.

The third section of the act, merely, then, amounts to this, that no Bank, claiming by virtue of the second section of the act of 1818, to take eight per cent., when no rate of interest

was expressed in the contract, should do so, on its *loans* or *discounts.*

The act is clearly applicable only to such Banks as were then in existence in the State of Alabama. [Huntsville Bank, chartered 1816, and limited to six per cent. on *loans* and *discounts;* St. Stephens' Bank, chartered 1818, (same day as law,) limited to six per cent. on loans and discounts.] And, moreover, the proviso applies only to loans and discounts made in the way of banking. The general interest law of eight per cent. would govern after the debt was due, unless some provision of the charter to the contrary.

It may be said that this proviso, with the provisions of the charters then existing, and since granted, shows a policy which we have infringed.

To this we answer, that such doubtful evidence of a policy ought not to be relied on. [See Richardson v. Mellish, 2 Bing. 229; 13 Peters, 582.] But, moreover, the policy, if granted, would only reach *loans* or *discounts.*

There is also a vague charge of usury committed under cover of discount, compounding, &c. The intention is every thing, in this allegation. For the definition of exchange, see 13 Peters, 65; 9 Peters, 378.

The law of the place where the contract is made, must determine the consequences to be visited upon it, when it is tested as to its validity or invalidity. [9 Porter, 1; 13 Peters, 65; 8 Wheaton, 53S; 5 East, 129; 12 John. 142; 10 Wheat. 367.]

This view, thus far, goes on the presumption that no one of the laws has been violated; but let us see what would be the consequence of the violation of either, or all. Would the contract and securities be void?

1. If in the violation of the charter, in the sixth fundamental article, (assuming, for the sake of argument, that the transaction is either *loan* or *discount,)* the article under consideration is a restriction on the general common law power of the corporation, to take interest after any rate agreed upon between itself and borrowers; it is, in effect, to the corporation what the general interest law of Pennsylvania is to an individual. In the absence of the restriction in the charter, and the law regulating interest at large, the corporation and the individual might lawfully stipulate for any rate. What, then, is the effect in

Pennsylvania, of the violation of the restriction imposed on the individual. See Turner v. Calvert, 12 Serg. & R. 46.

The foundation of this is plain; neither does the general law or charter make a forfeiture of the contract the penalty of violation. To confirm this, see 13 Con. 249; Fleckner v. B'k of U. S. 8 Wheat. 338; De Wolff v. Johnson, 10 Wheat. 367; B'k of U. S. v. Waggoner, 9 Peters, 378, affirming the case of Fleckner. Nor does the provision in the charter, for a *scire facias* by the Governor, alter the effect, as to the validity of the contract. See Fleckner v. B'k of U. S., supra.

In answer to the case of B'k of Chilicothe v. Swayne, et al. 8 Ohio, 258, which is the only case that appears to decide the point differently, the Court proceed upon the ground, plainly erroneous, that the right to take interest is derived from the restriction. The reasoning of the judge on the first point, as to the effect of the general law on contracts, made by individuals, is undoubtedly at variance with the conclusion he arrives at, when he applies the rule to the Bank; for in each case there is a restriction on a general common law power. This case is irreconcileable with Waggoner's case, in 9 Peters, 378; for there the intention to evade the charter corruptly, is made the test. Plainly, the *quo animo* need not be made an ingredient, if there be no capacity to make the contract at all; it would be *ipso facto* void, no matter how innocent, or meritorious the consideration. Besides, the Judge's own proposition in 8 Ohio, is a refutation of the argument. He supposes an acquisition of more land than was necessary for the convenience of the corporation, would be void for the whole grant. This cannot be, for there would be an express authority to hold so much as was necessary; the grant would be only void for the excess. The question, in both cases, is not a question as to capacity to make a contract of a certain character, but as to the degree and mode in which such capacity was to be exercised. Enough has been seen to settle the effect of the Pennsylvania statute. That does not avoid the contract in terms, and as, has been shown, the Courts have so held. [Turner v. Calvert, 12 Serg. & R. 46.]

How is the contract affected by statutes of usury of New York? The only pretence for applying those statutes at all, must, of course, be the payment of eight per cent. interest

there—the legal rate being seven—and a contract made there to take more, being declared void. Even if the agreement between the Bank and Hitchcock had been made in New York, the security being situated in Alabama, it has been decided by the Courts of New York, that stipulating for the rate of interest lawful in the place where the security is situated, is not corrupt or unlawful. See Hosford v. Nicholas, 1 Paige, 220; Chapman v. Robertson, 6 Paige, 627; Quince v. Callender, 1 Dess: 160. The statutes of Alabama do not make the contract void.

But if it were an unlawful contract, by the laws of every other State in the world, it is lawful, by the laws of Alabama, where it was executed, and no authority need be cited to prove that the Courts of this State will look alone to the laws of this State, in determining its character. [14 John. 339; 5 Harris & Johnson, 100, 109; 13 Peters, 65; 9 Porter, 1.]

1. We have shown that the contract is entirely consistent with the laws of Pennsylvania, New York and Alabama.

2. That if inconsistent, it is not void.

Let us consider whether any defects which might have existed in it, have not been removed by the payment of $150,000, and also the consequences of such removal upon the defences pretended.

We have shown that the contract could not be void by any of the laws alledged to have been violated. If defective at all, the only consequence would have been the abatement of the interest, in accordance with statutory regulations. The general rule as to the confirmation of such contracts is found, 1 Story Eq. 336, note; Comyn on Usury, 183; see, also, De Wolff's case, 10 Wheaton, 367.

Thus the defects are purged from the contract; or, if not, the agreement to receive $150,000 in satisfaction and abatement, amounts to an accord and satisfaction at law, and these defendants are estopped by it, from any inquiry into the nature or extent of the defects which they have thus been compensated for.

For Mrs. Hitchcock's power to execute the trust in the will, see Judson v. Gibbons, 5 Wendell, 225; 1 Sugden on Powers, 138; 2 Ib. 337; Willis on Trustees, 10 Law Lib. 65, note; Butler v. Leavins, 8 Porter, 380; Powell on Devises, 303; 21 Law Lib. 136, notes.

This brings us to the consideration of Mrs. Hitchcock's deed. The effect of this must be governed by the intention. [3 Powell on Mortgages, 1088, and note, and authorities there cited.]

There can be no doubt of the intention here. The payment of $150,000 relieved the bond and mortgage from any defects. The parties intended that complainants should go into possession, under the mortgage, as *bona fide* mortgagees, leaving to creditors their right to attach the securities, if they pleased; in which case the real debt and interest must have been paid to complainants, before the possession under the mortgage, could be vacated.

But above all, it has been repeatedly held, that where a note or other security is given for a pre-existing, valid, debt, as in this case, the $520,000 the debt due on unimpeached bills of exchange, although such note or security be void, for usury, yet the original debt is valid, and may be recovered. [5 Wendell, 597; 1 Henry Blackstone, 462; 7 Modern, 119; 2 Taunton, 184; 3 Campbell, 119; 19 Johnson, 150, 294; 11 Mass. 359; 8 Cowen, 77, 40.]

It is thus often held, that when a bond or deed is void for champerty, as on account of the relation between the parties, yet in declaring such deed void, the security is decreed to stand for the debt actually due. [18 Vesey, 119, 120; 3 Porter, 115; 12 Serg. & R. 46.]

ORMOND, J.—Before proceeding to the consideration of the merits of the case, we will first examine the objection to the parties. It is urged, that it is uncertain who are the complainants. The bill is filed by Cowperthwaite, Dunlap & Cope, to whom, acting for, and on behalf of the Bank, the bond and mortgage were executed. The next bill in order, is an amended and supplemental bill, filed by the complainants, in which they disclose the fact, that they are mere trustees for the Bank, and pray that the Bank may be made a party. Another amended and supplemental bill was filed, reciting at length the two former bills, and, among other things, disclosing the fact, that Cowperthwaite, Dunlap & Cope, had assigned all their interest in the mortgaged premises, to James Dundas and others, and pray, that the assignees may be admitted complainants, with

the Bank, and that the names of Cowperthwaite, Dunlap & Cope, be stricken out of the bill.

It cannot be doubted, that all these persons, who at different times, make their appearance in the cause, constitute, in law, but one person. Cowperthwaite, Dunlap & Cope, who filed the first bill, were mere trustees, but did not disclose their *cestui que trust.* In the second bill this is done, but certainly this cannot prejudice the rights of any, or create any difficulty. Afterwards, when the Bank went into liquidation, the fact is brought to the notice of the Court, and the names of the assignees spread upon the record, as parties complainant. This was undoubtedly correct. It does not appear from the record, whether Cowperthwaite and others were dismissed, as they prayed to be. They therefore remained as nominal parties, having ceased to have any interest in the matter in litigation.

It is supposed, that they are placed in such an attitude, that they may be considered as parties to the bill, or not, as may suit their convenience. This is undoubtedly a mistake. They are parties to the bill, and as such, estopped from denying any fact there alledged by them.

This is not the case of a party who has no interest, joining in a bill with one who has. The interest of all these parties is the same. The bank is the principal, the others are trustees, in whom the title is vested. It is, in fact, merely the case of trustee, and *cestui que trust,* uniting in the same bill; and although in this case, the Bank was not a necessary, it was certainly a proper party to the bill.

Proceeding to the examination of the merits, we will in the first instance, endeavor to ascertain the place where the contract was made. Henry Hitchcock, resident in Mobile, goes to Philadelphia, and makes the following proposition to the Bank of the United States:

Philadelphia, May 25, 1838.

Sir—I, the undersigned, am indebted to the President, Directors & Company of the Bank of the United States, in the following sums, independently of my liability for others, not now brought into view, and for the payment of which sums other satisfactory arrangements will be made, viz:

[Here follows a list of the debts, amounting, in all, to $520,530 96.]

To this sum, it is now proposed that the Bank add in money, in Mobile, for the purpose of improving and rendering productive, the improved portion of the real estate hereinafter proposed by me, to be mortgaged to the Bank, to secure the payment of the above debt. This sum to be advanced, and the prior *liens* upon it, hereinafter mentioned, with the interest on the whole, at the rate of eight per cent. to be advanced as the improvement progresses, and the payments are required.

[Then follows a list of the *liens* which existed upon the property proposed to be mortgaged.]

To secure the payment of the above sum of $620,530 96, after payment of the existing *liens* above named, with interest on the whole debt, as above, and all the advances, which have or shall be made, by the said Bank, on account thereof, at the rate of eight per cent. per annum, at the following periods of time, and in the following proportions, in the city of New York, that is to say: Two fifths thereof, of principal and interest to 1 March, 1838, (as stated above,) on 1 March, 1839.

One-fifth thereof, (as above,)	1 March, 1840.
One-fifth thereof,	1 March, 1841.
One do. do.	1 March, 1842.

The whole to be paid as above, in the city of New York, with the whole amount of the above debt and incumbrances unpaid, to be paid half yearly, in New York, on the 1st September, 1838, and on the 1st day of March and September, in the years 1839, 1840, 1841, and 1842, until the whole is paid; and I do hereby promise, to make and execute, in due form of law, to the said President, Directors & Co. of the Bank of the United States, their successors and assigns, a full and sufficient deed of mortgage, of all the following described real estate, free from all incumbrances, except as herein specified:

[Here follows a list of the property, with the value, amounting in all to $986,200 00.]

And I hereby, also promise, contract and agree, to, and with the said President, Directors & Company of the Bank of the United States, faithfully to invest the whole of the said sum of one hundred thousand dollars, herein proposed to be advanced to me, by the said Bank, for that purpose, in the substantial and beneficial improvement, of such portions of said mortgaged real estate, as may most require it; to make it productive; to

be laid out and expended, under the supervision and approbation of George Poe, as agent of the Bank, at Mobile, previously obtained: who shall also be appointed by me, by a proper instrument of writing, the sole receiver of all the rents and profits of the said real estate, to be mortgaged to the said Bank, until the debt is fully paid; to be paid by him as received, half yearly, on the 1st of March and September, of each year, to the credit of my said debt and liability, as above referred to.

And I do hereby further stipulate and agree, that on my failure to pay, or on the non-payment of any one of the said annual instalments of principal, or the interest, half yearly, as the same shall become due and payable, as herein provided for, the entire debt, with the interest that shall be then due thereon, shall be deemed and considered as all due presently, and on demand. And the said President, &c., shall thereupon, and in that case, have the right, and be at full liberty, to proceed to foreclose their said mortgage, without further delay, and sell the said mortgaged real estate in parcels, as they may deem best, for cash, to the highest bidder, and apply the proceeds towards the payment of the said mortgage claim. And if the proceeds of the said real estate, after the payment of the existing *liens*, with all costs and legal charges against it, shall not be sufficient to discharge and satisfy their said claims in full, I hereby promise and contract, to pay to the said President, &c., the deficiency. The surplus, if any, after discharging said claims, to be paid to me, &c.

HENRY HITCHCOCK.

NICHOLAS BIDDLE, Esq., President, &c.

Upon which proposition the Bank made the following order:

Bank of the United States, May 25, 1838.

The above and foregoing proposition of Henry Hitchcock, has been agreed to, and accepted by the President, Directors & Company of the Bank of the United States, and their agent at Mobile, George Poe, Jr. Esquire, will be authorized and instructed to carry it into immediate effect, on the part of the Bank. HERMAN COPE, 3d Cashier.

The agreement was consummated in Mobile, on the 14th July, 1838, by the execution of the bond and mortgage, contemplated by the proposition of Mr. Hitchcock. The sum stipulated to be advanced, $100,000, was paid to him at different

periods, between the 14th July and the 24th November, of the same year; and was expended in the improvement of the mortgaged premises.

By the proposition made in Philadelphia, Mr. Hitchcock distinctly admits his indebtedness to the Bank; where this debt was created, does not appear, and it is therefore fair to assume that it was created in Mobile. Be that as it may, he admits his indebtedness, and proposes an additional advance to him in Mobile, and in consideration thereof, agrees to execute a bond and mortgage on certain property in Mobile. This proposition, though acceded to by the Bank, is certainly not the contract of the parties; it clearly contemplates the execution of the contract there proposed, in Mobile. The fact that Mr. Hitchcock was in Philadelphia when the proposition was made, has no tendency to show that the contract was there executed. It is, in effect, precisely the same, as if the proposition had been made by letter from Mobile. It is, in fact, a proposition to make a future contract in Mobile, which the Bank acceded to, and promised to direct their agent to execute. Both parties so considered it. Mr. Hitchcock lived in Mobile; there the property to be mortgaged was situated—there the money was to be received—there the mortgage was to be made—in a word, there the proposition was to be carried into effect, by the execution of the contract.

On the 14th July, 1838, in Mobile, Mr. Hitchcock, pursuant to his proposition, executed to Messrs. Cowperthwaite, Dunlap & Cope, his bond, admitting his indebtedness to the Bank, in the sum of $620,530 96, with interest, at the rate of eight per cent. per annum, from the 1st March, 1838; the interest to be paid semi-annually, and the principal in four annual instalments, in the city of New York. On the same day, he executed to them a mortgage on a large amount of real estate, situate in Mobile, to secure the payment of the debt.

It is now insisted that this contract is void, because the Bank had no power by its charter, to make any contract, reserving a higher rate of interest than *six per cent. per annum.* That it is void, because it violates the law of Alabama—and if both these propositions are incorrect, then it is void by the law of the State of New York, where, by the terms of the contract, it was to be performed.

The law of Alabama, supposed to be violated by this contract, is not the general law against usury, which allows eight per cent. per annum, to be reserved for the loan of money, or forbearance of a debt; but it is the proviso to the act of 1818. [Toulmin's Dig. 443.] The act of 1818, authorized any rate of interest to be reserved, for the loan, or use of money, &c., which the parties might agree upon in writing; to which is a proviso, in these words: "Provided, that nothing in this act contained, shall be so construed, as to make it legal for any bank to receive more than at the rate of six *per cent. per annum*, for and upon its loans and discounts." This act was changed the succeeding year, by an act forbidding more than eight *per centum, per annum*, to be reserved on any loan of money, but without expressly repealing the former act. In the compilation of the law subsequently made by Mr. Aikin, this proviso is incorporated with the statute law, Aik. Dig. 263, § 3, and again in Clay's Dig. 284, § 3. The argument drawn from this, is, that it is a statutory declaration, that no bank shall take more than at the rate of *six per centum, per annum*, on its loans and discounts—that this prohibition must apply, as well to foreign corporations who, by comity, are permitted to make contracts within our limits, as to our own banks.

It is impossible to misapprehend the intention of the proviso to the act of 1818, at the time of its enactment. At that time, the Huntsville Bank was in existence, and the Tombeckbee Bank was chartered at the same session, and in the charter of both these banks, there was a prohibition against reserving more than six per cent. per annum, on their loans and discounts. The proviso, then, was inserted from an apprehension, that, in the hands of a corporation, the power to stipulate for any rate of interest the parties might agree on, would be liable to an abuse, which would not attend the same contract between individuals. Such being the intention of the proviso, and all the banks of the state being confined, by their charters, to six per cent. interest, it is not easy to perceive for what purpose it was retained on the statute book, after the power given to individuals to stipulate for any rate of interest, was taken away; especially as the prohibition against taking more than six per cent. per annum, has been repeated in the charter of every bank incorporated since that time.

Subsequent laws have been passed, authorizing the banks of the State to take more than six per cent. per annum, in certain cases, and neither the restriction in their charter, nor the proviso we are now considering, has ever been supposed, to extend to the purchase by the banks of bills of exchange. It would, therefore, seem perfectly clear, that the proviso is a dead letter as it regards our own banks, and has been retained on the statute book, without any distinct apprehension of its true intent and meaning. It is not credible, that it was retained on the statute book, with the design that it should operate on foreign corporations. Such was certainly not the design of its enactment, and if the legislature had subsequently conceived the intention of passing a law to operate on foreign corporations, it is inconceivable that they should have adopted this obsolete proviso, to effectuate their purpose. Without therefore entering upon the inquiry, whether this contract can be considered, either a *loan*, or *discount*, we cannot come to the conclusion, that the transaction is forbidden by any law of this State.

Is the contract void, because the money was to be paid in New York, where the statute rate of interest is seven per cent., and all contracts reserving a higher rate of interest, are declared void?

This is a question of the highest possible magnitude, from its intrinsic importance, and the vast amount of property involved in its solution. It has been argued, with an earnestness, and ability, commensurate with the stake. It has received from us a patient and most deliberate examination, and we will now proceed to state the results of our deliberations.

Upon this vexed question, certain propositions have been generally, if not universally, admitted. Personal contracts, are to have the same validity, force, and interpretation, in every other country, which they have in the country where they are made; provided, the contract is not offensive to the rights, morals, or public policy, of the country, in which it is sought to be enforced. If the parties stipulate for the performance of the contract in another country, the law of the place of performance will govern the contract. It follows, as a corollary, from this, that, if the rate of interest be higher at the place of performance than it is at the place of contract, the parties may stipulate for the higher rate of interest; and if the contract is

silent as to the interest which is to be paid, for delay, after the contract matures, the law of the place of performance will furnish the rule. [Story Con. of Laws, 2 ed. 246, 252; 2 Kent's Com. 4 ed. 459 to 461; Andrews v. Pond, 13 Peters, 65.]

May the parties stipulate, for the rate of interest allowed by the place of the contract, when that is higher than that of the place of performance? Upon this question, unfortunately, there is a great diversity of opinion.

The Supreme Court of Louisiana, held the affirmative of this proposition, in Depau v. Humphries, 8 Louisiana Rep. 1. That, was the case of a note made in Louisiana, payable in New York, the parties stipulating for the payment of a higher rate of interest, than was allowed by the usury laws of the place of payment. The case was most elaborately considered, and after a full examination of the civil and common law writers, and authorities, the Court determined, that the contract was valid. So, also, Chancellor Walworth held the same doctrine, in the case of Chapman v. Robinson, 6 Paige, 627. There the facts were substantially the same, as in the preceding case, with the additional fact, (which also exists in this case,) that a mortgage was executed by the debtor, on lands, lying in New York, the place where the contract was made, though to be performed in England. See also, to the same effect, 7 Paige, 616.

On the other hand, Judge Story, in his Conflict of Laws, after reviewing these decisions, maintains, that a rate of interest higher than that of the place of performance, cannot be stipulated for, though it be allowed at the place of the contract. [Story Con. of Laws, 247.] Amidst this conflict of jarring opinions, we must determine this question on principle, and by analogy to other known and settled rules of law.

A corrupt intention to take illegal interest, is of the essence of usury. When a note is made in this State, and here payable, reserving a higher rate of interest than the law allows, the intent to commit the offence of usury, is apparent upon the contract itself. If made here, and payable elsewhere, such an intent may, it is true, exist, but it does not appear from the contract; and as the intention may be fair, and honest, a Court of justice ought not to presume it to be otherwise.

Chancellor Kent says, "The general doctrine is, that the law

of the place where the contract is made, is to determine the rate of interest, when the contract specifically gives interest; and this will be the case, though the loan be secured by a mortgage on lands in another State, unless there are circumstances to show, that the parties had in view the law of the latter place in respect to interest." [2 Kent. Com. 469, 4th ed.] So, also, it is clear, that, although the interest of the place of payment may be agreed on, though it be higher than that of the place of the contract, yet, if the intent be to obtain usurious interest, the contract will be void. [Andrews v. Pond, 13 Peters, 65.] As, therefore, the place of the contract, in the absence of any corrupt intention, furnishes the rule, when the contract specifically gives interest, it would seem to follow necessarily, that the contract, if valid there, would be valid at the place of payment, though it reserved a higher rate of interest than was allowed by law, on contracts made at the latter place.

There is, however, another incident of this contract, which more peculiarly stamps its true character, at least in this State, and upon this proceeding. The bill is filed, to have the benefit of a mortgage executed here, upon lands situate here. This mortgage was made to secure the payment of a debt created here, reserving the legal interest of this State, and this was the domicil of the debtor. Can we refuse to enforce this contract, which strictly conforms to our own laws, merely because the money, to secure the payment of which, it was made, was payable in another State, where the rate of interest was lower than it is here? In our opinion, we cannot. It is not pretended that the form of the contract was a cover to evade the usury law of New York. The contract is therefore to be considered as *bona fide*, it is authorized by our law, and we cannot refuse to enforce it.

We have not considered it necessary to examine at length the numerous English and American cases, cited by the plaintiffs' counsel on this point, to be found on the brief of their argument. None of them are precisely in point, though there are *dicta* going the length contended for by them. The cases cited by the defendant's counsel, from 8th Martin, and 6th and 7th Paige, are identical with this, and, in our opinion, determine the law correctly. We are conducted to this conclusion, not only because, upon authority, such appears to be the law,

but also, because it accords with sound morality, and the obligations of good faith.

It is further contended, that the Bank had no power to make this contract, by the charter.

The fifth article of the act incorporating the Bank, contains the general grant of power to the Bank, to hold real estate under certain restrictions—to deal in bills of exchange, &c. A portion of the sixth article is as follows: "The rate of discount at which loans shall be made within this commonwealth, shall not exceed one-half of one per cent. for thirty days."

It cannot be doubted, that the legislature may impose such terms as it pleases, to the exercise of a power granted to a corporation, and if the power be not exercised in the mode prescribed, the act will be void. [Head & Amory v. The Providence Insurance Co. 2 Cranch 127; N. Y. F. Ins. Co. v. The M. F. Ins. Co. 7th Wendell, 31.] Here the legislature have not prescribed the mode, in which the power shall be exercised. The power to loan is expressly granted, with a prohibition, that not more than six per cent. per annum shall be taken, or reserved, upon its loans, within the State of Pennsylvania. It may be conceded that a violation of this restriction, would, within the State of Pennsylvania, render the act void. Such was the decision of the Supreme Court of the United States, in the case of the Bank of the U. S. v. Owens, 2 Peters, 527. The principle of the decision, avowed by the Court, and sustained by numerous citations, is, that the act, which, in that case, was lending money, at a higher rate of interest than the charter authorized, was an act in violation of a public law, and therefore void. The same decision was made by the Supreme Court of Ohio, in the B'k of Chilicothe v. Swayne, 8 Ohio Rep. 258; but the reason assigned is, that the Bank had no power to act, but in accordance with the terms of the charter, which is, perhaps, in substance, the same principle. A different conclusion was arrived at by the Supreme Court of Connecticut, in the case of the Philadelphia Loan Co. v. Towner, 13 Conn. 249, where it was held, that such an act was merely a violation of the usury laws of Pennsylvania, and the security only was void. In these cases, the act complained of, was a violation of the statute law of the State where the contract was made; in the case of the United States Bank v. Owens, of an act of Congress; but

in this case, there is no violation of any law. The prohibition of the charter, by its express terms, does not extend beyond the limits of Pennsylvania, and cannot have an *extra* territorial efficacy, as a law.

It cannot be controverted, that a corporation, when permitted to act by the comity of another State, within its limits, can exert no power, and do no act, which it is not authorized by its charter to do. These faculties, when exerted in a foreign State, must be in subordination to its laws, and declared public policy. It would, therefore, have been a most useless act in the legislature of Pennsylvania, to undertake to prescribe the conditions upon which it should exert its faculty of lending money, in a foreign State, where, by comity, it might be permitted to act. All that it was in the power of the legislature of Pennsylvania to do, was to give it the capacity to do the act. It did confer on it the power to lend money, and when it exerts this power in a foreign State, it must conform itself to the laws of that State. If the prohibition had been ten, instead of six, per cent per annum, most certainly this would not have authorized the Bank to take more than the legal rate of interest, at the place where the contract was made, and for the same reason, it may take more, if the law of the place permits it.

The error of the argument, consists in not observing the distinction between the power to do an act, and a mere incident of the power; which being purely accessorial, may be done or omitted, without affecting the power itself. This precise point, was thus decided by the Supreme Court of Louisiana, in the case of Frazier & Co., and others, v. Wilcox and others, determined in May, 1843, of which we have seen a manuscript opinion of the Court. That was the case of the Pennsylvania Bank of the United States, establishing an agency in New Orleans, for the purpose of banking. In the case cited, it had made a loan at ten per cent. per annum, and the Court held, that as that rate of interest was allowed by the laws of Louisiana, the contract was valid, notwithstanding the restraint in the charter, on loans within the State of Pennsylvania.

The result of this investigation is, that the contract between Hitchcock and the Bank is not usurious, or made in contravention of the laws of this State, and that the Bank had the power to make such a contract within this State; it follows, therefore,

that the mortgage taken by the Bank, to secure the debt, may be foreclosed.

Here, our task would be at an end, but for the peculiar form of the decree of the Chancellor, that the complainants might, at their election, take a decree for a strict foreclosure, or have a sale of the mortgaged premises. This is only important to the defendants, upon the assumption that the mortgaged property is worth more than the debt secured by it. However improbable this may be, we cannot act upon the contrary presumption, but must assume that the heirs, and creditors, have an interest in the equity of redemption, which ought to be protected.

This brings us to the consideration, of the questions which arise under the conveyance by Mrs. Hitchcock, to the Bank.

It is insisted by the counsel for the plaintiffs in error, that the devise was to Mrs. Hitchcock as executrix; that she could not act under the will, except in her capacity of executrix; and that not having qualified as such, her acts were void.

The seventh clause of the will in which the particular devise in question is made, is as follows: "For the purpose of having my estate properly settled, and administered, during the minority of my children, I do hereby appoint my dear wife, Anne, my sole executrix; and I do bequeath and devise the same, both real and personal, to her, in trust, with full power to sell, either at public or private sale, all, or any part thereof, and the proceeds to re-invest, and re-sell, at her discretion, for the purpose of paying my debts, and legacies, or for a more advantageous investment, and good, and sufficient, deeds, and conveyances, to make therefor. It being my intention, and will, that my estate shall be kept together and held in common, for her benefit, and that of my children, until they shall become of age respectively; at which time, and as soon after as any one of them comes of age, he, or she, is to receive their proportion; it being always understood, that my wife is to receive an equal proportion of my estate, with my children, she and they having share, and share, alike."

The will was made on the 13th May, 1836. On the 13th September, 1836, he published a codicil, re-affirming his will, and giving some additional legacies, and declaring, that it should include all his estate, real and personal, to that date.

On the 4th August, 1837, he made a second codicil, in which he recites the great revulsion which had just taken place in commercial affairs, and expressed his apprehensions that it might affect his estate, and made some change in the legacies he had previously given, and re-affirmed, and republished the will, in all other respects.

On the 21st February, 1838, he made a third codicil, in which he recites, that he has purchased some real estate since the date of the last codicil, which he desires his executrix to carry into effect according to the directions of his will.

On the 10th of August, 1839, he made a fourth and last codicil, in which he says he has reviewed the will, and previous codicils, and adds: "I have no new testamentary disposition to make, but desire, that my will as it results from four papers heretofore executed by me, be carried into effect." and after enumerating the four testamentary papers, and describing them by their dates, he continues: "To the end, therefore, that my said executrix shall have full power to sell, convey, and dispose of real estate, as well as all other property, I again declare my intention, that such power to sell, and convey, shall extend to all lands acquired since the making of said testamentary papers, as well as to those acquired before, full power being intended to be given her in this respect, I do, therefore affirm again, the said testamentary dispositions, and desire them to be carried into full effect, the last of course controlling previous dispositions, when inconsistent."

The office of the codicil, is to explain, add to, or subtract from the provisions made in the will. It is annexed to the will, and in law the will and codicils—if there be more than one—constitute but one instrument. [Fuller v. Hooper, 2 Vesey, Senr. 242.] In Leavens v. Butler, 8 Porter, 388, it is said by this Court—"A codicil is a part of the will; it is therefore to be construed with it, and may, as a context, confirm, vary, or altogether change an intention, expressed in the body of the will."

In the argument of this cause, great stress has been laid on the language of the fourth codicil, as showing that the devise to Mrs. Hitchcock, was in her character of executrix. It does not appear to us to be a just criticism. The devise to Mrs. Hitchcock in the will, is unconnected with her office of

executrix, and the power conferred on her is such, as does not appertain to that office. The estate both real and personal, is devised and bequeathed to her, "in trust, with full power, to sell, either at public or private sale, all, or any part thereof, and the proceeds to re-invest, and re-sell, at her discretion, either for the purpose of paying debts and legacies, or for a more advantageous investment," &c. More comprehensive language than this, to give her the absolute power over the estate, cannot be conceived. She had not only the power to sell in any manner she thought proper, but she might invest the proceeds in other property, and sell again; and this she might do in her discretion, either to pay debts, and legacies, or to make a more advantageous investment for the estate.

The design of the different codicils is apparent; they were rendered necessary by changes in the estate of the testator. As he supposed his wealth was increasing, he increased his benefactions; and it is most honorable to his memory, that one of the largest bequests, was to the free school of the city in which he lived, of which he had been the munificent patron, and which almost owed its existence to his bounty. In 1837, foreseeing to some extent the calamity which impended over him, he makes some alterations in the legacies proportionate, to the expected subtraction from his estate. In the last codicil, he declares that he has reviewed the former testamentary papers, and has "*no new testament to make;*" and reaffirms the will, and all the previous codicils. So far as we can judge from the codicils themselves, the principal design in their execution, was, that lands acquired subsequent to the date of the will, should be subject to its control. It is true, in the last codicil, he speaks of his *executrix* having power to sell real estate, but that he did not intend to circumscribe the power already given, is shown in the next sentence, where he says: "*I again declare* my intention, that such power to sell, and convey, shall extend to all lands," &c. Indeed, it would seem, that if this is not a devise in trust, and not a mere power, it would be difficult by language to create one. Whatever might be the effect of this codicil standing alone, when considered in connection with the will, to which it refers, and of which it is a part, not a doubt can be entertained as to its true intent and meaning—that it was the intention of the testator, to vest

Mrs. Hitchcock with full power over the estate, both real and and personal, to sell and dispose of the same, as in her discretion she might think proper, without reference to her character of executrix. The devise to her was not for the purpose of sale merely, but, "that it (the estate) should be kept together and held in common (by her) for her benefit, and that of the children, until they respectively come of age." Can it be doubted, that if she had declined to qualify as executrix, it would not in the slightest degree have effected this devise in trust? See the case of Judson v. Gibbons, 5 Wendell, 225, where a devise to "executors hereinafter named," was held to be a devise in trust to them individually, and not as executors, from the control given to them over the realty, until the youngest child came of age. See also the authorities cited on the brief of the defendant's counsel, on this point.

We proceed to the consideration of the character of the sale, and conveyance, made by her.

It appears that after the death of Mr. Hitchcock, Mr. Herman Cope, as the agent of the Bank, came to Mobile, to endeavor to make some arrangement in reference to the property of the Bank in that place. That Mr. James Erwin, the brother of Mrs. Hitchcock, represented himself to be her agent, and after considerable negotiation, a compromise was effected, by which the Bank was to advance $150,000, for the purpose, as was alledged, of paying the unsecured creditors of Mr. Hitchcock. In consideration of this advance, all defence to the bond and mortgage upon the bill, which had been filed during Mr. Hitchcock's life, was to be abandoned, and the bill suffered to abate, by omitting to revive it. Mrs. Hitchcock was to convey to trustees for the Bank, all the estate, and interest, she had as devisee in the mortgaged premises—the Bank to be let into the immediate possession, and to relinquish all further claims on Hitchcock's estate, and take the mortgage property for the debt.

The agreement was executed apparently in good faith. The money was paid, and Mrs. Hitchcock executed her deed, in which she recites, that by virtue of the power conferred on her by the will of her husband, and in consideration of the sum of $773,453 23, (the amount of the mortgage debt and interest,) she "acknowledged, remised, released, conveyed,

and forever quit claimed, unto the trustees of the Bank, all the estate, right, title, interest, use, trust, property, claim, and demand whatsoever, at law, as well as in equity, in possession, as well as in expectancy, all and singular," &c., describing the mortgaged property, &c.

This is, beyond all doubt, a conveyance of the equity of redemption in the mortgaged property. The legal title was already in the Bank by the forfeiture of the mortgage, and there was nothing upon which the conveyance could operate, if it did not convey the equity of redemption. Such was the intention of the parties to it, as is obvious from the previous negotiations, and such is its legal effect. Mrs. Hitchcock is estopped by the deed, from denying that such was not her intention. The argument urged, that Mr. James Erwin was not her agent, is answered by the deed itself; and if in truth, as alledged, she did not receive the money, it must be charged to her implicit confidence in the agent, whose acts she ratified, by fulfilling all his engagements in her behalf. That this large sum of money, was paid to Mr. James Erwin, to extinguish the claim which he set up to eight store houses in Mobile, which were covered by the mortgage to the Bank, would be incredible, if it were not, as it is, fully disproved.

It is urged, that a trustee cannot "*release*" his interest without other operative words of transfer. Conceding this to be the law in the case of a naked trust, the law does not apply to this case. All the estate, whether legal or equitable, which Mr. Hitchcock possessed in the lands, passed, by the will, to his wife, for the purpose of enabling her to execute the trust; and if she had the power under the will, of disposing of the equity of redemption—a proposition which must be admitted —it passed, by this conveyance. As to the mode by which the transaction should be evidenced, it is apprehended that any assurance, which would convey the fee, would be sufficient for that purpose. It is however stated in 1 Powell on Mortgages, 260, in the note, "that a mere *release* indorsed on the back of the mortgage deed, will be a sufficient assurance, for by that means the equity of redemption, if conveyed to the mortgagee, will become merged and annihilated in the legal estate; and the mortgagee will be seized of the fee sim-

ple, discharged of the mortgage." He, however, recommends a separate deed, as more appropriate and usual.

But this deed is not, technically considered, a mere release. It is a quit claim deed, conveying all the interest, which, as devisee, Mrs. H. took in the mortgaged premises; and if such an assurance would have been sufficient to convey the equity of redemption, if made by Mr. Hitchcock, in his life, it is sufficient if made by his devisee.

The *bona fides* of this act on the part of the Bank agents, has been attacked, but we think without the least foundation in justice. The facts were, that the title of the land had been brought in question, and perhaps considered doubtful, by the bill filed by Mr. Hitchcock, charging the Bank with usury. To remove this objection, and to get into immediate possession of the mortgaged property, was the inducement to the compromise, for such in truth it was. The charges on this head against the agent of the Bank, are founded on the supposition, that the Bank debt was illegal, and the mortgage invalid; and it is no where alledged, or pretended, that the equity of redemption was worth the price paid for the compromise. It would seem to be in truth, if the money had been fairly applied to its legitimate purpose—the payment of unsecured creditors—a most valuable arrangement for them. It does indeed appear, that some stratagem was to be resorted to, to conceal the transaction from other creditors, which was certainly objectionable, as all artifice is; but we are unable to perceive any thing illegal, or immoral, in the transaction, on the part of the agents of the Bank.

It is now ascertained that the debt was not usurious, and the mortgage a valid security; it is therefore impossible that the contract by which the Bank paid $150,000 to quiet their title, and obtain peaceable possession of their own property, could be a fraud on any one.

The fact, that the estate of Mr. Hitchcock was declared insolvent after this contract was made, and executed by the payment of the money, does not affect its validity. In Darrington v. Borland, 8 Porter, 9, the Court say—at page 33—"I apprehend that the just construction of this act, (the act of 1806,) is to make lands liable, no matter how devised, or into whose hands they may pass, unless sold by a decree of the

Orphans' Court, or of Chancery; or unless when sold by a trustee, authorized, either expressly, or impliedly, by the will, the sale is *bona fide*, and the proceeds actually applied to the payment of creditors." In such a case, the right of the trustee, except so far as he has executed the trust, must yield to the paramount right acquired by the Orphans' Court, by the decree of insolvency. Here, however, before the decree was made, the trustee had executed the trust, and received the money; and the subsequent insolvency of the estate, cannot vacate the sale, though it might entitle the administrator to the proceeds, for the purpose of distribution among the creditors.

We come now to the consideration of the decree made in the cause by the Chancellor. If no sale of the equity of redemption had been made, the decree would have been a common foreclosure and sale in the ordinary mode, and we are now to inquire, whether the agreement entered into by the agents of the Bank, with Mrs. Hitchcock, authorized the decree made by the Chancellor.

Our practice certainly is, not to decree a strict foreclosure; but we think with the Chancellor, that there is no impropriety in such a decree, when the facts of the case warrant it. If the property mortgaged is clearly insufficient to pay the mortgaged debt, we can see no reason why the mortgagee should be put to the expense of a sale, if he is willing to take a strict foreclosure. If the fact be not admitted, a reference might be made to the master to ascertain its value, and if the question were doubtful, and no consent given, certainly no such decree ought to be made.

In this case, although we consider the deed of Mrs. Hitchcock to be a conveyance of the equity of redemption, and that she had power under the will to make the sale, yet under the circumstances of this case, it was clearly competent for the administrator, who, after the estate was declared insolvent, was a necessary party to the bill, as the representative of the creditors, upon the allegation, and proof, either of fraud in the agreement made by the Bank with Mrs. Hitchcock, or that the equity of redemption was worth more than was paid for it, to insist on a sale of the mortgaged premises. No such allegation is made. The effort is to invalidate the bond and mortgage, and no suggestion has been made, that the mortgaged

premises will more than discharge the debt. Nor is it all probable that it is adequate for that purpose. No possible good therefore, can result to any one from a sale of the property; but a most unnecessary expense would be incurred by such a course. As therefore, the entire reason for decreeing a sale of mortgaged premises rests upon the interest of the mortgagor, if he has none, and the mortgagee desires a strict foreclosure, we are of opinion he is entitled to it. For the practice of the English and the American Courts, and the reason on which it is founded, see 2 Story, Com. on Equity, 293, and cases cited.

In equity, the maxim is, once a mortgage, always a mortgage. If the parties stipulate, that it shall be redeemable during the life of the parties only, the heir, may notwithstanding, redeem. [Newcomb v. Bonham, 1 Vernon, 7.] So also in a similar case an assignee may redeem. [Pow. on Mort. 118, a, note 1.] In Van Burgen v. De Marest, 4 J. C. 37. Chancellor Kent held, that, although there was a power of sale in the mortgage, as the right to redeem existed, it was proper to file a bill.

Although the right of the mortgagee to purchase the equity of redemption, is undoubted, yet a Court of Chancery looks with distrust upon such contracts, from the influence which the incumbrance gives the mortgagor over the mortgagee. [Webb v. Rorke, 2 Sch. & L. 673. See this doctrine fully stated in 1 Powell on Mort. 123, in note.]

Such being the law, we entertain no doubt of the jurisdiction of the Court. The mortgagee had a right to have his title quieted by a decree of the Court, and by bringing all the parties before it, to obtain the judgment of the Court upon his title.

The question of dower is not raised upon the bill, nor put in issue, it is not therefore proper to make any remark in relation to it.

We have examined all the assignments of error, and believe, that the opinion here pronounced covers them entirely Let the decree of the Chancellor be affirmed.

LIGHTFOOT, ET AL. v. STRAHAN.

1. An agreement by the vendee of slaves to return them, and pay such sum of money on demand as is equivalent to their depreciation, forms a sufficient consideration for the rescission of the sale.
2. Where upon an agreement to rescind a sale, it was incumbent on the vendee to do the first act in order to consummate the rescission, if he has omitted to do any thing, he cannot resist the payment of the purchase money by setting up the agreement.
3. An appeal bond, conditioned that the appellants shall prosecute their appeal with effect, and if they "fail therein, then pay the judgment with such damages and costs as shall be adjudged against them in said Court," substantially conforms to the statute.

Writ of error to the Circuit Court of Chambers.

This was, originally, twenty-three cases commenced before a justice of the peace by the defendants in error, against two of the plaintiffs, with whom their co-plaintiffs became associated as sureties in appeal bonds. These cases were consolidated by the Circuit Court, and a declaration filed on all the notes. The cause was submitted to a jury, as the record recites on issue joined, but what was the plea does not appear. A verdict was returned for the plaintiffs, for the amount of the notes and interest, and a judgment thereon rendered against the defendants below, and their sureties.

On the trial the defendants excepted to the ruling of the Court. From the bill of exceptions, it appears, that the plaintiff below having introduced the notes, evidence was then adduced by the defendants, tending to show that the notes were given for a family of negroes, warranted to be sound, and that one of them was unsound. Further, that a short time after the purchase of the negroes, the parties agreed to rescind the contract, and the defendant to pay the plaintiff the amount they had depreciated in value, to be determined by arbitration. The evidence in respect to the agreement to rescind, left it doubtful, whether it was induced by the unsound-

ness, or for reasons independent of the soundness or title of the slaves. No evidence was adduced to show, that the defendant had returned, or offered to return the negroes, but the proof tended to show, that at the time the rescission was agreed on, it was also stipulated that the defendant should call and get the slaves.

The Court charged the jury, that if the agreement to rescind was founded upon the unsoundness of, or want of title to the slaves, then "they should consider the same in favor of the defendant; but if the agreement to rescind was disconnected with, and independent of the title or soundness of said slaves, that they could not take the same into consideration."

HEYDENFELT, for the plaintiff in error. The motives which induced the parties to rescind the contract cannot be considered in determining whether it should be enforced. It was put an end to by the agreement so to consider it, and each party was remitted to the condition originally occupied by him. In addition, it is contended that the appeal bond has not such a condition as the statute requires, and no judgment could have been rendered against the sureties. [Quinn, et al. v. Adair, 4 Ala. Rep. 315.]

P. PHILLIPS, for the defendant. The charge to the jury was clearly correct. It merely declares that if the agreement to rescind was without consideration, it was not binding. As to the appeal bond it does not come within the case cited, but its condition substantially conforms to the statute.

COLLIER, C. J.—It is laid down generally, that all executory contracts may be rescinded by the parties to them, if they continue interested until the agreement to rescind is made. [Johnson v. Reed, 9 Mass. Rep. 78.] And an executory contract in writing, not under seal, may before breach, be discharged and abandoned, by a subsequent unwritten agreement, although the original agreement to be binding, is required by the statute of frauds to be in writing. [Buel v. Miller, 4 N. Hamp. Rep. 196.] So where two contracts have been entered into in relation to the same subject matter, the last will control or rescind the first, (as the case may be) though there

be no such contract expressed therein. [Reed v. McGraw, 5 Ohio Rep. 380.]

It has been held that where a sale is made of goods, which are delivered, and an agreement is afterwards made to rescind the contract, the rescission is not complete until a re-delivery has taken place. [Miller v. Smith, 1 Mason's Rep. 437. See also Quincy v. Tilton, 5 Greenl. 277.] When contracts are rescinded, the parties should be restored to their former rights, and placed in the same situation in which they stood previous to the agreement. [Conner v. Henderson, 15 Mass. Rep. 319; Griffith v. Fred. Co. Bank, 6 G. & John. Rep. 424; Chapman v. Shaw, 3 Greenl. Rep. 59; Wilt v. Ogden, 13 Johns. Rep. 56.]

Having stated these principles as guides to conduct us to a proper conclusion, we proceed to consider the case stated in the bill of exceptions. The charge to the jury, supposes, that a consideration, other than the undertaking of the defendant to deliver the slaves to the plaintiff, and to pay him the amount they had depreciated in value, was necessary, in order to impart validity to the agreement to rescind. In this it is clear, from several of the citations made, that the Court misapprehended the law. Surely the return of the slaves, or the agreement to return them, and pay such sum of money on demand, as was equivalent to their depreciation, formed a sufficient consideration to abrogate the contract of sale.

Let us inquire whether the rescission has been consummated, so as to authorize the defendant to set it up in bar to an action on the note; for unless this has been done, the defendant in error has not been prejudiced, and although the charge be illegal, the judgment of the Circuit Court cannot for that cause be reversed. Assuming that the plaintiff was to call for the slaves, until this was done, the defendant could not be put in default: it was enough if they were delivered on demand. Thus far the plaintiff was willing to trust the defendant, and he himself the first to act. But no time appears to have been designated when the amount the slaves depreciated in value, should be ascertained or paid, or who should take the first step towards the contemplated arbitration. As this was part of the agreement which was to be perfected to relieve the defendant from the payment of the purchase money, as stipulated by his notes,

he of course, should, in a reasonable time after the terms of the rescission were agreed, have given the plaintiff notice of his readiness to arbitrate, and submitted some definite proposition leading thereto. And after the amount to be paid was thus ascertained, he should in a reasonable time have paid, or offered to pay it to the plaintiff. All this was necessary to have entitled the defendant to the benefit of a rescission, and the only reason, if any, why a return of the slaves was not incumbent on the defendant, was because the plaintiff had agreed to call for them himself. This conclusion, seems to us to result from several of the authorities cited, and to be a consequence of the principle, which requires parties rescinding a contract, to be placed in *statu quo*, except so far as they have agreed to dispense with an observance of this rule.

It follows from what we have said, that the error in the charge to the jury, has worked no injury to the defendant, and he cannot derive a benefit from it, here.

The condition prescribed by the statute, where a party appeals from the judgment of a justice of the peace, is, that the appellant shall prosecute his appeal with effect, and if cast in the suit, pay and satisfy the condemnation of the Court. [Clay's Dig. 314, § 9.] The condition of the bonds in the case before us, is that the appellants shall prosecute their appeal with effect, and if they "fail therein, then pay the judgment with such damages and costs as shall be adjudged against them in said Court." There is no substantial variance between the statutory condition, and that which has been adopted; and consequently the bond is such a one, as the Court might summarily render judgment on, against the sureties.

The consequence is, that the judgment of the Circuit Court is affirmed.

HANCOCK v. JORDAN.

1. A cotton gin is not a fixture to the freehold, and therefore will not pass by a grant of lands, on which the gin house is located, to a trustee, for the purpose of being sold to pay the debts of the grantor. Notwithstanding such a grant, the cotton gin remains the property of the grantor, and may be taken by virtue of an execution against him.

Writ of error to the Circuit Court of Madison.

CLAIM to certain property, to wit: thirty bales of cotton and one gin head, interposed by Jordan to a levy, by virtue of a *fi. fa.* at the suit of Hancock against one Moore.

At the trial the claimant gave in evidence a deed from Moore, conveying certain lands and slaves to him, in trust for certain purposes, and proved that the plantation on which the cotton was raised, was the lands described in the deed from Moore to him; and, also, that the gin head was on said plantation, at the date of the deed; the gin head was attached to the floor of the gin house, by a brace, and such is the usual mode of fastening. It was proved that Jordan, the trustee had advertised the property for sale, and actually sold it, on the 24th January, 1843, to a person not connected with this suit, and the levy was made before the said sale.

On this proof the Court charged the jury, that if they believed the gin head was attached to the floor of the gin house, as gin heads ordinarily are, then, that it was attached to the freehold, and not liable to the execution. Another question was also raised at the trial, with respect to the time when the affidavit of claim was made, it being after the sale by Jordan, though the claim was made and bond executed before the sale; but this is not relied on by the plaintiff, in his brief. It also appears, by an agreement between the counsel of the parties, that the bill of exceptions, should contain the statement that the proof showed the plantation was cultivated by Jordan, with the slaves conveyed to him by the deed, the year preceding the

sale, and that the ginning establishment had been used for the purposes of the plantation, and for nothing else.

McCLUNG, for the plaintiff in error, contended that the gin head was a mere personal chattel, and therefore did not pass by the conveyance of the plantation. A cider mill, fixed by the owner of the fee, on his lands, for the purpose of his trade, passes to the executor and not to the heir. [3 Atk. 14.] Looking glasses screwed to the wall; even backs of chimneys and a furnace purchased with the house, go to the executor. [1 P. Wms. 94; 2 Strange, 1141.] So with trade fixtures. [2 Vern. 508; 5 B. & A. 625; 1 B. & A. 161; 6 D. & E.] If an article is merely fixed or screwed in a groove, or socket, so that it may be taken out without injury to the groove or socket, it is not on that account a fixture. [2 B. & A. 165; 1 Leach, 201; 2 East. Pl. 590.] So machinery, fixed by bolts and screws to the floor, are not fixtures.

S. PARSONS, contra, insisted, that as between vendor and vendee, any thing necessary to the enjoyment of the freehold, of a fixed nature, would pass by the deed. Although as a *trade fixture* it might, between landlord and tenant, be considered as a personal chattel. He cited McDaniel v. Moody, 3 Stewt. 314; Miller v. Plumb, 6 Cowen, 665; Elwes v. Maw, 3 East, 38; Nov. 1844, No. Law Lib. 228, or 2 Sewall on Sheriffs.

GOLDTHWAITE, J.—There is no subject of such unmixed difficulty, at this day, as to determine what is, and what is not, a fixture to the freehold, if reference is had to the older decisions upon the questions connected therewith; or in ascertaining to whom it belongs as between vendor and vendee, heir and executor, landlord and tenant, mortgagor and mortgagee, and debtor and creditor; to say nothing of partition between joint tenants, coparceners, and tenants in common, and the rights of tenants in dower, and by courtesy. The entire subject, in its different ramifications, is examined in Elwes v. Maw, 3 East. 38; Walker v. Sherman, 20 Wendell, 636; and Powell v. Munson and Bromfield Manufacturing Co. 3 Mason, 459; where all the cases, ancient and modern, as well as English and American are cited, and in the New York case

examined and collated. It appears also, that in Fairis v. Walker, 1 Bailey, 540, the highest Court of South Carolina held, in a suit by the vendor of land against his vendee, for the conversion of a cotton gin, that it passed to the latter by the sale and conveyance of the plantation as a fixture. This case is not before us, so that we are unable to ascertain the precise grounds for the decision; but we entertain no doubt that such terms of expression may be used in the conveyance of lands, as would require the construction that such and similar articles should pass by the deed. Thus in Farrar v. Stackpole, 6 Green. 154, it was held that a *mill dam* passed to the vendee, upon the conveyance of a *saw mill;* and in Lushington v. Sewell, 1 Sim. 435, the Vice Chancellor seemed to consider that the devise of a West India plantation, as such, would carry the slaves and stock with it, as being intended by the devisor.

In the present case, the conveyance is an ordinary trust deed, whereby lands, slaves, stock, and farming utensils, are conveyed to a trustee, in trust, to be sold for the purpose of paying debts, &c., and there are no expressions used in the deed to authorize us to suppose the lands were conveyed as a *cotton plantation*, or was to be sold by the trustee, as such; so that no inference can arise as in the case of a grant of a *saw mill* that the *mill dam* passed.

But, in our opinion, the question as to this gin being a fixture, does not arise. In the many inventions which have sprung up in modern times, none are more calculated to require an application of new rules, than all those machines, which, though impelled by a stationary motive power, are themselves portable, and of equal use every where. Of this description are cotton gins, carding machines, power looms, spinning jennies, corn mills, cob and crushing machines, etc., etc. To apply to these articles the same rules which formerly obtained, and which doubtless would obtain now, in relation to stationary grain mills, stationary steam engines, or saw mills, would seem to be absurd. How can we suppose dower in a cotton gin, or a tenancy by courtesy in a cob machine? We think that none of these machines are entitled to be considered as fixtures; but, that in all cases, they are personal chattels, which do not ordinarily pass by a conveyance of the ground on which they stand. Doubtless, the stationary machinery by

which they are impelled, is governed by other rules. See McDaniel v. Moody, 3 Stewart, 314; 3 Mason, 419.

In this view the charge of the Circuit Court cannot be sustained. The judgment is therefore reversed, and the cause remanded.

WATSON v. BRAZEAL.

1. A replication to a plea of the statute of limitations, that the note was made in South Carolina, and that the defendant moved from that State before six years had expired after the making of the note, tenders an immaterial issue.
2. If issue is taken upon a plea tendering an immaterial issue, the Court cannot instruct the jury to find against the evidence; but should after the issue is found either award a repleader, or render judgment *non obstante veredicto.*

Error to the Circuit Court of Wilcox.

ASSUMPSIT by the plaintiff against the defendant in error, on a promissory note, dated 20th July, 1836, for the payment, three days after date, of five hundred and seventy-nine dollars.

The defendant pleaded non-assumpsit, payment, and the statute of limitations.

To the last plea, the plaintiff replied, that the promissory note mentioned in the declaration, "was made, executed and delivered to the plaintiff in the State of South Carolina, where the plaintiff now resides, and that the said defendant removed out of said State, before the expiration of six years next thereafter, and has continued out ever since," &c.

Upon this replication the defendant took issue, and issue was also joined upon the pleas. Upon the trial, the plaintiff moved the Court to charge the jury, that if the proof sustained the plaintiff's replication to the defendant's plea, that then the statute of limitations did not bar the plaintiff's right of recovery; which charge the Court refused, and charged the jury, that

the issue joined upon the replication, was an immaterial issue, and the jury should not consider it; to which the plaintiff excepted, and which he now assigns for error.

BETHEA, for the plaintiff in error, cited 1 S. & P. 37, to show that the replication was good; and 3 Porter, 43, to establish that the Court erred in its charge.

SELLERS, contra.

ORMOND, J.—The facts recited in the replication to the defendant's plea of the statute of limitations, certainly tendered an immaterial issue. It is probable that the fact intended to be put in issue, was that the defendant had not resided six years within the State of Alabama, which, according to the decision of this Court, Towns v. Bardwell, 1 S. & P. 37, would have been a good replication to the plea. The replication, in this case, merely asserts, that the note was made in South Carolina, and that the defendant moved from that State before six years had expired, after the making of the note. That might be true, and yet the defendant might have resided six years in this State, so as to make the bar of the statute effectual.

It is the right of parties to have the issues of fact they make up, tried by the jury; what will be the effect of the issue when found, is matter of law. [Hazard v. Purdom, 3 Porter, 43.] Generally, the Court will award a repleader, or it may render judgment *non obstante veredicto;* but it cannot instruct the jury to find the issue contrary to the evidence.

See the case of Cullum v. The Branch Bank at Mobile, 4th Ala. Rep. 39, where this question is considered, where an immaterial issue is tendered in connection with good pleas; and although it was held that the defendant was not entitled to a general verdict, on the good and bad pleas, yet that the defendant was entitled to a verdict on the immaterial plea, if sustained by the proof.

For this error the judgment must be reversed, and the cause remanded.

SIMPSON v. PETTUS, USE, &c.

1. In an action against the purchaser of lands at a sale under execution, the execution was produced, on which was indorsed the levy and sale; a witness was then introduced who testified that he acted as the deputy of the plaintiff on the day of sale, that he made a memorandum on a slip of paper which described the land correctly, and the defendant as the purchaser for the sum of two hundred and thirty-seven dollars: *Held*, that the fair inference both of reason and law, was, that the witness was acting as deputy *at the sale of the land, and then, or immediately thereafter*, made the *memorandum*. If the fact was otherwise, the defendant by a single inquiry could have elicited the truth, from the witness, and cannot now be heard to alledge that the inference from his evidence is false.

Writ of error to the Circuit Court of Lauderdale.

This was an action of assumpsit, at the suit of the defendant against the plaintiff, to recover of the latter, the sum of two hundred and thirty-seven dollars, which he bid for part of fractional section 12, township 3, range 11, west, situate in Lauderdale county, and containing one hundred acres, more or less. This land was offered for sale by the plaintiff below, as sheriff, under an execution in favor of the party for whose use the suit was brought, against Frederick P. Nelson, issued on a judgment for $589 19, damages, and $32 31¼, costs.

The defendant demurred to the declaration, and his demurrer being overruled, the cause was tried on the general issue, with leave to give any matter in evidence which would constitute a good defence, if specially pleaded. The jury returned a verdict for the plaintiff, and judgment was rendered accordingly.

On the trial, the defendant excepted to the ruling of the Court. It is shown by the bill of exceptions, that the plaintiff, Pettus, was sheriff of Lauderdale, and in that character had in his hands an execution, such as is described above, which he levied on the lands designated in the declaration; that after having given thirty days notice of the time and place of sale, he sold the same at public auction, and the defendant became

the highest bidder, for all the right, title, and interest of the defendant in execution, to these lands, for the sum of $237. The execution was produced, and on it were indorsed the levy and sale. George Arnett was introduced as a witness, who testified that he acted as the deputy of the sheriff, on the day of sale, that he made a memorandum on a slip of paper, which described the land correctly, and the defendant as the purchaser, at the price stated. This memorandum he stated had been lost. Witness further testified, that some days thereafter—the time he could not state with precision—the plaintiff, as sheriff, tendered to the defendant a deed for the land, conveying all Nelson's interest therein to him, (defendant.) This deed the defendant refused to accept, and pay the purchase money. There was no proof that the defendant, or any one on his behalf, signed the memorandum spoken of by the witness, or any other memorandum.

The defendant, by his counsel, prayed the Court to charge the jury that the proof was not sufficient to bind the defendant, so as to entitle the plaintiff to recover; this instruction was refused. But the Court charged the jury, that the memorandum in writing, made by Arnett, the deputy sheriff, was sufficient to bind the defendant to his bid; and if they believed, from the evidence, that the defendant was the purchaser of the lands as it had been stated, and the facts were sufficiently established by the testimony, then they must find for the plaintiff.

J. W. McClung, with whom was S. Parsons, for the plaintiff in error, insisted, that although Arnett may have acted as the deputy of the plaintiff, and made a memorandum of the sale, which, in point of form, was sufficient, yet it is not shown, that this memorandum was made at, and immediately consequent upon the sale, or that it was afterwards shown to, or approved by the defendant. [Adams v. McMillan's Ex'rs, 7 Porter's Rep. 73; Robinson v. Garth, 6 Ala. Rep. 208.]

W. Cooper, for the defendant in error, contended that the evidence was such as to have authorized the charge of the Court. The fair and reasonable interpretation of the proof, as stated in the bill of exceptions, was, that Arnett acted as the deputy of the sheriff, at the time of the sale; that if he did not sell under the execution, he was then present, and made the

memorandum of which he spoke; and that the sale and memorandum were but parts of an entire transaction. The one following the other as soon as it reasonably could. He cited the cases relied on by the plaintiff in error, and referred to Currie v. Mann, 6 Ala. Rep. 531.

COLLIER, C. J.—It is conceded that the action was well brought, and may be maintained, if there was such a memorandum made of the defendant's bid, as is necessary to take a case out of the statute of frauds. The only conclusion that can be drawn from the evidence on this point, is, that Arnett was the deputy of the plaintiff below, who sold the land under the *fieri facias;* that immediately after the sale he noted upon a piece of paper, a description of the land, and stated thereon that the defendant was the purchaser, for the sum of two hundred and thirty seven dollars. True, this does not appear *in totidem verbis,* but it is the inference of reason and law, from the statement of the witness, that he was acting as deputy for the plaintiff, on that day, and he then made a memorandum in writing, of the sale. If this presumption is opposed to truth, it would have been very easy for the defendant, by a single inquiry addressed to the witness, to have caused a more full disclosure of the facts to be made. But as he had an opportunity of examining him, and the inquiry we have suggested would have occurred to every mind, if the inference from the testimony was false, he cannot now be heard to alledge, that the Court should not have assumed the fact, but that it should have been left to the jury, to say whether the memorandum was made at, or immediately after, the sale. [See Carson v. The Bank of the State, &c., 4 Ala. Rep. 148.] It would be trifling with justice, instead of promoting it, to permit a party to avail himself of such an advantage to the prejudice of his unsuspecting adversary. But the ruling of the Circuit Court need not be defended by this course of reasoning; for the evidence we have seen was entirely sufficient to support it. The judgment is consequently affirmed.

McVAY'S ADMR'S v. KREBS.

1. After the plaintiff has taken issue informally upon a plea of the insolvency of the estate of which the defendants are sued as administrators, and which plea is conceded to be substantially good, it is error if the judgment entry recites that it was overruled by the Court.

Writ of Error to the County Court of Mobile county.

ASSUMPSIT by Krebs against E. and D. McVay, as administrators of the estate of D. McVay, deceased. The defendants pleaded—1. Non-assumpsit. 2. That the estate of the said McVay had been by them represented as insolvent, and so declared by the County Court of Mobile county, by which letters of administration were granted. The transcript contains a memorandum, that issue was taken on both pleas. The judgment entry recites that the second plea being considered by the Court, "the same is overruled." A verdict was then found for the plaintiff, on which judgment was given.

The defendant now assigns as error—

1. That the plea of insolvency was overruled, and adjudged insufficient.

2. That the judgment ought to have been referred to the Orphans' Court.

ADAMS, for the plaintiff in error.

DARGAN, contra, insisted that the proper construction of the judgment entry is, that a judgment was pronounced, not on the sufficiency of the plea, which he conceded was good, but was upon the evidence offered to sustain it.

GOLDTHWAITE, J.—Both parties concur that the record of the Orphans' Court appended to this transcript, cannot be noticed in the present condition of the record; we shall, therefore, decline any consideration as to the effect it would have had, if produced, to sustain an issue of *nul tiel record* upon the plea of insolvency. With respect to the statement in the judg-

ment entry, that this plea was overruled, we think it can only mean, that the Court declared it bad, as a defence. It is true, no demurrer was interposed, but this circumstance only makes the error of the proceeding more apparent, as a demurrer was the only regular mode of testing the legal sufficiency of this plea. The concession that it is good, in effect, disposes of the only question raised.

The judgment must be reversed, and either remanded for further proceedings, or here entered, referring the judgment to the County Court, at the option of the defendant in error.

CUTHBERT v. NEWELL.

1. Evidence which is relevant to the issue, cannot be rejected by the Court, because, unless assisted by other proof, it will not establish the point in dispute. If *prima facie* irrelevant, it may be rejected by the Court, unless the party offering it states its connection with other facts showing its relevancy.
2. Evidence, that eighteen months before the suit, the plaintiff received from the defendant, accounts, and claims, to a much larger amount than the note sued on, for the purpose of collecting them, and paying the debt, relevant, because it was the initiatory step towards proving a payment.

Error to the Circuit Court of Mobile.

ASSUMPSIT by the defendant in error, on a promissory note of the plaintiff in error, for $586, and judgment.

On the trial, the defendant offered in evidence the deposition of John L. Thomas, by which it appeared that about eighteen months, or two years, ago, the plaintiff received accounts and claims due the defendant, for the purpose of collecting, and paying himself, to the amount of about fifteen hundred dollars, but the witness did not know what the agreement of the parties was, in relation to the accounts and claims so received. The

Court excluded the testimony, on the ground that it constituted no defence against the claim of the plaintiff, to which the defendant excepted, and which he now assigns for error.

STEWART, for plaintiff in error.

DARGAN, contra, insisted that the evidence, without further proof, constituted no defence, and that no further proof being shown, or offered, the Court correctly excluded it. [8 Porter, 176; 15 Wendell, 155.]

ORMOND, J.—The question presented for revision, upon this record, has been so often before this Court, and the rule which governs it so frequently expounded, that it is matter of surprise it should be misunderstood.

If evidence be relevant to the issue, it cannot be rejected by the Court, because, unless assisted by other testimony, it will not establish the point in issue. If *prima facie* irrelevant, it may be rejected by the Court, unless the party offering it, states its connection with the other facts, in order that its relevancy may be seen by the Court. This is the result of all the cases. See Innerarity v. Byrne, 8 Porter, 176; Bell & Rhea v. Conner & Co. 1 Ala. Rep. 83; Mardis' Adm'r v. Shackleford, 4 Ala. Rep. 494; and Crenshaw v. Davenport and wife, 6 Id. 390; to which many more might be added.

To ascertain the propriety of its rejection, we must look at the issue between the parties and the testimony offered. The action was assumpsit on a promissory note; what the issue was does not appear, but we may intend that it was the general issue, as it appears from the record that there was an issue. The testimony offered, was, that some eighteen months before that time, the plaintiff received from the defendant, accounts and claims to a much larger amount than the note, for the purpose of collecting them, and paying the debt. Now, this was certainly the first step towards proving a payment of the note. Unaided by other proof, it would be no defence to the note, as the accounts appear to have been received as collateral security merely; but the defendant may have had it in his power to prove other facts, from which the jury might have inferred a collection of the money, sufficient to discharge the whole or a part of the note. From this it appears, that the testimony was

prima facie relevant to the issue, and should not have been rejected.

We have been referred to the case of Taggard v. Curtenius & Jones, 15 Wendell, 155, as an authority, that the proof offered was irrelevant. In that case, the defendant to a suit against him, on a promissory note, pleaded, that the plaintiff had received some bridge stock as collateral security, and that by his negligence in omitting to dispose of it, until the bridge was destroyed, it had become of little or no value. The Court held it to be no defence—that one right of action, could not be set up in bar of another right of action. It is obvious that this case has no application to the one at bar. Here there was no attempt, so far as we can judge from the record, to rely as a defence upon the negligence of the plaintiff in not collecting the accounts. The proof offered, was the initiatory step, towards proving payment; and, being legitimate for that purpose, although insufficient, without further proof, the Court could not reject it.

Let the judgment be reversed and the cause remanded.

THE STATE, EX REL. NABOR'S HEIRS.

1. Where the plaintiff in an action of trespass to try titles dies *pendente lite*, the suit does not abate; but if brought for the recovery of the freehold, its prosecution may be continued in the name of the plaintiff's heirs, and if a term of years, or mere chattel interest is sought to be recovered, in the name of his personal representatives. As the pleadings do not show the *quantum* of interest in controversy, the heirs or personal representatives, as they may agree between themselves, may be made plaintiffs, their right to recover depending upon the proof as adopted to their respective interests.
2. If a suit is improperly abated by order of Court on account of the plaintiff's death, its reinstatement may be coerced by *mandamus*.

THE relators, by their counsel, have presented to this Court, the record of an action lately pending in the Circuit Court of Shelby, at the suit of Wm. Nabors, now deceased, against Elihu Jones and others. That action was commenced on the 26th of March, 1842, as well to try titles to a certain tract of land, particularly described in the indorsement on the writ, and in the declaration as to recover damages for its detention and occupancy by the defendants.

At the term of the Circuit Court, holden in the fall of 1844, the case was disposed of, and an order entered as follows: "This day came E. W. Peck, the attorney for the plaintiff, and the said defendants by their attorneys, and the attorney for the plaintiff suggested, that since the last continuance of this cause, the said plaintiff had departed this life, and moved the Court, that the same be revived in the name of the heirs at law, of the said William Nabors, which the Court refused. The said attorney then moved the Court, to revive the said case in the name of the administrators of the said William Nabors, and produced to the Court the letters of administration; which motion the Court refused, and ordered the said cause to abate."

The counsel of the relators then presented to this Court their petition, in which, after disclosing the foregoing facts, they pray that a rule be made requiring the Circuit Court of Shelby to rescind the order they entered in the case referred to, and permit the relators to be made parties plaintiff in the same; or else show cause why a peremptory mandamus shall not be awarded.

E. W. PECK, for the relators, cited, Strange's Rep. 1056; Adam's Ejectment, (Tillinghast's ed.) 289; 8 Johns. Rep. 495; 18 Id. 295-302; 1 Wend. Rep. 27; 3 Id. 153; 1 Hen. &. M. Rep. 531; 3 Munf. Rep. 191; 1 Chitty's Pl. 59, 60; 4 Vin. Ab. 274, (p. 2.); 11 Id. 124.

COLLIER, C. J.—The act of 1821, declares, that "The fictitious proceedings in the action of ejectment are hereby abolished; and hereafter the mode of trying the right and title to lands, tenements, or hereditaments, shall be by action of trespass, in which the plaintiff shall indorse on his writ, and

copy writ, that the action is brought as well to try titles, as to recover damages." By the act of 1835 it is enacted, that "In all cases where the action of trespass to try titles, would, under the present laws, be the proper action, the plaintiff at his election, shall have either said action of trespass to try title, or the action of ejectment; and when the action of ejectment shall be brought, it shall be lawful, and shall be the duty of the jury trying the same, to assess the damages in favor of the real plaintiff, as in action of trespass to try titles." [Clay's Dig. §§ 43, 46.]

The first section of the act of 1821, very clearly indicates, that the action of trespass in the form which it prescribes, is but a substitute for ejectment with its common law fictions. And the second section declares, that the laws then in force in relation to the latter action, except as far as relates to fictitious proceedings therein, shall be applied to the action of trespass to try titles. This latter provision is not affected by the act of 1835, which merely gives ejectment where the plaintiff shall elect to sue in that form of action, instead of trespass. This being the clear construction of the statutes cited, we have but to inquire, what is the law in respect to an action of ejectment, in the condition in which the present case comes before us.

Without multiplying citations to the point, it may be stated, as a settled rule, that the death of the lessor of the plaintiff in ejectment does not abate the suit. [Frier v. Jackson, 8 Johns. Rep. 495; Jackson v. Austin, 1 Wend. Rep. 27.] The act of 1802 declares, that no suit shall abate by the death of either plaintiff or defendant, where the cause of action survives, and provides the mode for its revival. [Clay's Dig. 313, § 1.]

The action of trespass to try titles is not, in legal effect, trespass *quare clausum fregit*, and embraced by the act of 1826, which authorizes an executor or administrator to revive such a suit. In the former, the trial of the title and recovery of possession is the principal matter, to which the damages are accessorial, and it may be revived by an application of the rules which govern the remedy by ejectment.

It may be supposed, that the heirs are not entitled to the damages accruing previous to the death of their ancestor, and as the remedy in their favor cannot, by a revival of the suit,

secure all the rights of the original plaintiff, they should not be allowed to prosecute the action. Be this as it may, we think it furnishes no test by which the question we are considering can be determined. The recovery of the land, we have said, is the primary purpose of the suit, and the diminution of the damages by a change of plaintiffs, cannot defeat the principal object.

If then, the action was brought for the recovery of the freehold, upon the death of the plaintiff, his heirs are authorized to continue its prosecution; if a term of years, or a mere chattel real is sought to be recovered, it belongs to the personal representative, and in such case the executor or administrator is to be substituted for the decedent, to the remedy he commenced. In the action of trespass the *quantum* of interest in controversy, is not shown by the record, and the Court will admit either the heirs, or personal representatives, to revive the action, according as an agreement between them may show either the one or the other to be entitled. If, upon the trial, the proof should show that an improper plaintiff had been made, without reference to the merits of the case, there could be no recovery in his favor.

The consequence of what we have said, is, that the refusal of the Circuit Court to permit the suit to be revived, and ordering the same to be abated, was an error prejudicial to the relators. It is therefore ordered, that a *mandamus* issue to the Circuit Court of Shelby, commanding that Court to reinstate the cause therein lately pending, at the suit of Wm. Nabors against Elihu Jones and others, defendants, and permit the same to be revived in the name of the proper parties, instead of the plaintiff, who, it is alledged, has died since the commencement of the action; or else show cause at the next term of this Court, why this mandate has not been obeyed.

SAVAGE v. FORWARD.

1. Where a constable has sold slaves under a levy made by him, there being at the same time an older levy by the sheriff, a subsequent creditor levying on the slave, after the sale, cannot raise the question, as to the right of the constable, under the circumstances to levy.
2. Where a slave sold by a constable is afterwards levied on by another creditor, and claimed by the purchaser, an amended return made by the constable during the trial of the claim, may be read as evidence, it being good so far as it goes.
3. Where a creditor makes an affidavit to procure the immediate issuance of an execution, his motive is not *prima facie* a subject of inquiry, though under certain circumstances, as for instance, a case of fraudulent combination to defraud creditors, this inquiry may be made; yet it is necessary to set out these circumstances in the bill of exceptions, before an appellate Court can judge whether the motive could be inquired into.

Writ of error to the County Court of Clarke county.

CLAIM of property, interposed by Forward, to a certain slave levied on by the sheriff, by virtue of an execution, at the suit of Savage against one Dean. The claimant made title through the medium of a constable's sale, by virtue of an execution against the goods, &c. of Dean, by a justice of the peace. This execution, bearing date 1st January, 1842, was given in evidence; upon it was this indorsement: "Rec'd 1 January, 1842. Levied on the following slaves, to wit: Joe, Daphne, Jenny, Maria, Jim and George, 3 January, 1842. Satisfied, 3 Jan'y, 1842. Neil Ezell, Const." The claimant then offered to prove by the constable, that he sold the slaves named in the return to the claimant; which being objected to by the plaintiff in execution, the claimant moved the Court to permit the constable to amend his return, but the Court refused either to direct or prevent such amendment, and the constable then added to and amended his return, that he had sold the said slaves to the claimant, for $1,386, on the 3d January, 1842. The claimant then offered to read the return so amended, to the jury, which the Court allowed, against the objection of the plaintiff.

There was evidence tending to show, that the sheriff of Clarke county, previous to the levy by the constable, had levied certain executions in his hands, upon the same slave. Whereupon the plaintiff asked the Court to instruct the jury, that if such was the fact, the constable could not levy on the same slave, and that any levy so made by the constable, was absolutely void. This was refused, and the Court instructed the jury, that a levy made by the constable, after a levy on the same slave by the sheriff, was not void, but voidable. And that so soon as the execution in the sheriff's hands was satisfied, then the levy made by the constable, bound and held the property. There was evidence tending to show, that the creditor whose execution was in the constable's hands, had made oath, that unless the execution was issued forthwith, he would be in danger of losing his debt. On this the Court charged the jury, they could not inquire into the motives of the creditor in taking this oath. This creditor, was the purchaser from the constable, and is now the claimant.

The evidence tended to show, that the constable gave no notice of the sale, under the execution, and that the execution debtor had, in writing, waived all exceptions for want of notice, and insisted on the sale. On this the plaintiff asked the Court to instruct the jury, that a sale by a constable, without notice, was void. This was refused, and the jury instructed, that a sale without notice, was valid, if no creditor was prejudiced, the property bringing a just and reasonable valuation, and the debtor consenting to the sale without notice.

The plaintiff excepted to these several rulings of the Court, and they are now assigned as error.

Leslie, for the plaintiff in error, made the following points:

1. Property once levied on, remains in the custody of the law, and is not liable to be taken by another execution, in the hands of a different officer. [10 Peters, 400.]

2. The Court of a Justice, is not one of record; the best evidence, therefore, of the sale by the constable, was his testimony, and not his return upon the execution.

3. The claimant, being the creditor by whom the sale was forced, the jury might properly inquire into his motives in causing an execution to issue forthwith.

4. The Constable ought to have given twenty days notice of sale. [Clay's Dig. 216, § 78.]

Blount, contra, insisted, that no question of the right of the constable to levy, was involved here, as no one disputed the right.

The contest is not between creditors, as such, contesting the priority of liens, but as between a purchaser and a creditor, seeking to set aside a sale, on account of supposed defects in the authority of the agent. All this was assented to, and ratified by the debtor, and the sale may be considered as made by him, through his agent.

The only question between these parties should have been, as to the *bona fides* of the transaction. And the motives of the party in suing out execution, had nothing to do with the matter in issue.

GOLDTHWAITE, J.—Under the circumstances of this case, the question does not arise in relation to the conflict of right between the sheriff and constable. Whatever may have been the rights of the different creditors, under their respective levies, they, as well as the debtor, seem to have acquiesced in the sale made by the constable. It is a creditor subsequent in point of time, to either of those who had previously levied, who is now seeking to set aside the sale. It was held in this Court, at a very early period, that a sheriff's sale was valid, although the statutory notice had not been given, Wright v. Spencer, 1 Stew. 576, and such is now the settled law of this State. [Ware v. Bradford, 2 Ala. Rep. 676.] Hence, we conclude, that the present plaintiff cannot dispute the validity of the sale, made by the constable, on account of any irregularities, either in the levy or manner of selling.

2. With respect to the admission of the constable's return as evidence, to the jury, we can perceive no error. Whether further evidence from the constable, or some other person, of the actual sale, was not requisite, is a question not raised on the record. The return of the execution was proper evidence, so far as it went.

3. It is not stated in the bill of exceptions, in what way it became material to inquire into the motives of the claimant in

suing out execution, immediately after obtaining his judgment, and, therefore, we cannot determine that the instruction given was erroneous: *prima facie*, the motive of the creditor could have no influence on the subsequent sale, and although such an inquiry, under certain circumstances, would have been proper, as, for instance, a fraudulent combination to secure the property from other creditors, these should have been made to appear on the bill of exceptions. It falls within the rule, that when evidence is *prima facie* immaterial, its relevancy should be shown.

We think there is no error, and the judgment is affirmed.

BURDINE v. ROPER, ADM'R.

1. An administrator causes an execution to be issued upon a judgment obtained by his intestate, and to be levied on a slave which is claimed by a third person, and a trial of the right of property is had under the statute, which results in the condemnation of the slave, who is sold, and the money received by the administrator. Afterwards, the judgment of condemnation is reversed, and upon another trial the slave is found not liable to the satisfaction of the execution. *Held*, that the administrator was liable in an action of assumpsit, in his individual, and not in his representative character, for the money so received.

Error to the Circuit Court of Pickens.

ASSUMPSIT, by the defendant against the plaintiff in error.

From a bill of exceptions, it appears, that a firm styled Davis & Humphreys, of which one Joseph Martin was a partner, recovered a judgment against the administratrix of David Archer. Martin died, and the plaintiff in error became his administrator, and in that capacity had control of the above recited judgment. An execution issued on the judgment, and was levied on a slave in the possession of one Wier, who interposed a claim under the statute, and upon the trial the slave was found subject to the execution, sold, and the proceeds

paid to Burdine. Subsequently this Court reversed the judgment, and on a second trial, the slave was found not subject to the execution. This action is brought by the administrator of Wier to recover back the money.

The Court charged, that the plaintiff was entitled to recover.

The defendant moved the Court to charge, that if Burdine received the money as administrator, there could be no recovery against him individually, which the Court refused; and to the charge given, and that refused, the defendant excepted.

B. F. Porter, for plaintiff in error, insisted, that the principle, that money paid upon an execution may be recovered back, did not apply here, because the judgment and execution remained in full force. [6 Cowen 300; 9 Johns. 232.]

The action will not lie against the defendant personally, as the presumption must be, that the money has been paid out in the course of his administration. [4 Porter, 352; 3 Johns. 183.]

He also cited 2 Day, 153; 13 S. & R. 292; 2 Dall. 231; 2 Mun. 272.]

L. Clarke, contra. The money arising from the slave, was not assets of the estate, and therefore the defendant could not have been sued in his representative character. [5 Cow. 280.]

The sale of the slave was a trespass which the party may waive, and proceed in assumpsit for the money. [5 Pick. 285; 12 Id. 120.] He also cited 10 Wend. 354; 6 Cowen, 299.

ORMOND, J.—The general principle is not denied, that an action of *indebitatus assumpsit* will lie, to recover back money paid upon an execution, issued on a judgment which has been reversed; but it is argued, first, that the rule does not apply to such a case as the present, where the judgment remains in full force, and the execution is not vacated.

The judgment in virtue of which the slave was sold, was rendered upon the proceeding, under our statute, for the trial of the right of property, a proceeding which is collateral to the judgment on which the execution issued, and is in itself a suit, conducted by different parties. The reversal of a judgment of

condemnation upon a trial of right of property, being a separate and distinct proceeding, does not affect the validity of the judgment upon which the execution issued; but such reversal vacates the judgment of condemnation, and the execution which issued upon it, by virtue of which the property was sold. We need not now inquire, what the effect of this reversal would have been upon third persons purchasing the property; the reversal of the first judgment condemning the slave, and the subsequent judgment, that the property was not subject to the plaintiff's execution, conclusively establishes, that he has no title to the money derived from the sale under the first judgment.

The doctrine contended for, that no action can be maintained against the plaintiff, except in his character of administrator, proceeds upon the supposition, that the money derived from the sale of the slave, was assets of the estate in his hands to be administered; but no proposition can well be clearer, than that the proceeds of this sale were not assets. If the distributees, or creditors, should attempt to hold him responsible for this money, the reversal of the first judgment, and the subsequent proceedings, would be conclusive to show, that the estate had no title to it.

It is further urged, that we must presume that the money has been paid out in the course of the administration, and that therefore, the plaintiff is not personally responsible. If such an inference could be drawn, it would avail nothing in this case. Cases may indeed be supposed, in which the *prima facie* intendment being, that the property belonged to the estate, the administrator would not be personally responsible, if he disposed of it in the regular course of administration, before a claim was asserted to it. But that is not this case. Here, the levy was made, and the property sold by his direction, and he is personally responsible for the consequences. No suit can be maintained, or judgment be recovered, against an executor, or administrator as such, unless the judgment when recovered, may be satisfied out of the estate in his hands to be administered. But it is too clear for argument, that no judgment could be maintained in this case against the estate, and it therefore follows, that the judgment against him in his individual character was proper. Let the judgment be affirmed.

RUTLAND'S ADM'R v. PIPPIN AND ANOTHER.

1. An execution may be arrested by *supersedeas*, if an unjust or improper use is attempted to be made of it, and this although the objection does not appear of record, but is shown by oral testimony.
2. The sheriff is not authorized to pay the money due on a judgment, and keep the execution open for his own benefit. But, *quere*, if the defendant avail himself of the payment, by moving to quash the execution, is not a previous request to pay, or a subsequent adoption of the act, the necessary inference.

Writ of error to the Circuit Court of Greene.

J. D. WEBB, for the plaintiff in error.

A. GRAHAM, (of Greene,) for the defendant.

COLLIER, C. J.—In this case the defendants obtained a *supersedeas* to arrest proceedings on a *fi. fa.* against their estate, at the suit of the plaintiff, and then moved the Court to quash the same, and cause satisfaction to be entered on the judgment. On the hearing of this motion, it was agreed, that the sheriff of Greene, on the 19th May, 1842, paid to the agent of the plaintiff in execution, the amount due thereon, saving sixty dollars, the attorney's commissions, (which they had since received.) This payment was made by order of plaintiff's attorney, as evidenced by their receipt; and it would seem as an advance by the sheriff in discharge of an official liability.

The Court quashed the execution, and ordered satisfaction to be entered on the judgment, and that execution issue against the plaintiff for costs.

In Lockhart, et al. v. McElroy, 4 Ala. Rep. 572, it was held, that an execution may be superseded, if an unjust or improper use is attempted to be made of it, although it be authorized by the judgment; and the objection may be shown by extrinsic proof, even if it be mere oral testimony. This is an authority conclusive, to show, that the objection to the evidence, by which the satisfaction of the judgment was shown, is clearly untenable.

As it respects the second question, viz: can the defendants avail themselves of the payment of the amount of the execution, so as to destroy the vitality of the judgment? this cannot be regarded as a disputable point in this State. In Boren, et al. v. McGehee, 6 Porter's Rep. 446, we say, "it is certainly true, that the sheriff has no power to pay the money due on the judgment, and keep the execution open for his own benefit. To allow such a traffic would open a door to the greatest abuses, and be an invitation to extortion." In Fournier v. Curry, 4 Ala. Rep. 323, we repeat with approbation what was there said. See also, Johnson v. Cunningham, 1 Ala. Rep. N. S. 257. These citations are conclusive against the plaintiff upon the last point.

Whether the sheriff could not, if he showed that the money was paid in Mobile, at the request of the defendants, maintain an action against them for money paid, laid out, &c.; or, whether the motion to quash, and thus obtaining the benefit of it, would not warrant the presumption of a previous request, or subsequent adoption of it, are questions which we need not consider, in the present posture of the case.

It follows from what has been said, that the judgment of the Circuit Court must be affirmed.

WALTON v. TIMS, BIGELOW AND CALDWELL.

1. When a father directs the proceeds of certain bales of cotton to be applied by his factor in payment of a specific debt of his son, he is warranted in countermanding the direction, at any time before the factor has thus appropriated the money, or entered into an engagement with the creditor, who is the object of the remittance, to hold it for his use.

Writ of error to the Court of Chancery for the first district of the Southern Division.

This bill is filed by Walton, alledging that a sum of money is due by him, as the proceeds of certain cotton, to one of the defendants, but that each of them claim it, and will sue for it, unless prevented by the interposition of Chancery. He sets out the manner by which the money came to his hands, the claim asserted to it by the defendants, and concludes with a prayer that they may interplead.

Tims and Bigelow answer the bill, each asserting his claim to the money, and it was taken as confessed against Caldwell. The facts, as gathered from the allegations of the bill, admissions in the answers, exhibits and proofs, are these:

Alexander Tims, a son of the defendant, Amos Tims, was in partnership with Caldwell, and they were indebted to Bigelow in the sum of $900 50, by note, in which Tims appeared as the maker, and Caldwell as indorser. This note was due 1st February, 1839. On the 8th of December of the preceding year, Caldwell wrote to Amos Tims, apparently in answer to a letter requesting information as to his son's affairs, as connected with the business in which he and Caldwell were engaged, "our note, favour of W. S. Bigelow, amount $900 50, will be payable the 1st February next, and I regret to add, that I am much perplexed as to how the means for its payment are to be obtained. All the assistance you can possibly afford me at this critical period, will be most thankfully received. I have several letters from your son. He says money is very scarce there, in Texas. He expresses great solicitude concerning the Bigelow note, and observes that our credit both in Texana, and Matagorda, is very fair, and should the note in question be dishonored, the consequence there would be ruinous. From the excited hopes with which your letters have filled me, I will endeavor to allay his feelings on this head."

In answer to this, the elder Tims wrote, on the 19th December, "You say his note is due on the 1st of February. I am doubtful I will not be able to pay the whole amount, but I wish to send you a few bales of cotton to sell for his benefit, say thirteen or fifteen bales, which I think I can spare. Please say to whom I shall ship it, and when, as I have it now packed. I hope you will see to the sale of it, as I wish to get the highest price, to help my son out of the scrape, for I had rather live on bread and water, than he should sink or fail."

Caldwell had left Mobile for Texas before this was received, and the complainant wrote the elder Tims, under date of 26th December, to this effect: "In a few days after he wrote you, Mr. Caldwell left this place for Matagorda. He constituted me attorney and agent, to act for him in his absence. I heard him often speak of the note he and your son gave to Mr. Bigelow. He has left in my hands some accounts to collect, which I am sorry to say I cannot get paid. Should you be disposed to send me any cotton, your instructions shall be obeyed, in selling the cotton for the best price, and the money appropriated by paying Bigelow, or sending to you, as you may direct."

On the 5th January, Mr. Tims writes to the complainant: "I intended to ship the fourteen bales to Mr. Caldwell. I am glad to hear you are his agent. I will ship it in two or three days, to you, as a present to my son, and hope you will get a good price; you can judge the quality and will know what it will sell for, and pay over the proceeds for my son and Caldwell. You will please let me know the net amount, for I shall wish to know how near it will pay Mr. Bigelow off. I have raised my son without a mother, and I had rather live on bread and water, than live to see his credit sink or go down."

A witness on behalf of Bigelow, proved, that after the sale of the cotton by the complainant, the elder Tims had said that the proceeds were to go to the payment of the note of Bigelow; that he had given the cotton for that purpose, and had instructed complainant, as his factor, and as the agent of Caldwell, so to apply the proceeds; and the witness supposed, that the elder Tims, thought that the note had been taken, and the proceeds so applied, long after the maturity of the note. He was willing that it should be so applied, but the complainant was unwilling to pay it, because Caldwell had given him notice not to do so. The younger Tims died in Texas, about the time the cotton was sold.

The Chancellor considered the gift as complete, by the delivery of the cotton to the complainant, with the instructions to apply the proceeds to the object contemplated, and that it thereby became irrevocable. He accordingly decreed that Walton should pay over the money to Bigelow, and that Tims should pay the costs. This decree is now assigned as error.

B. F. PORTER, with whom was PHILLIPS, for the plaintiff in error. CAMPBELL, contra.

GOLDTHWAITE, J.—We think it very clear that this decree cannot be sustained. The elder Tims, actuated by most praiseworthy motives, intended to aid his son by a gift of the proceeds of the cotton remitted to the complainant, but Bigelow had no title, either in the cotton or its proceeds, until the factor had consented to hold the money for him. Until an actual payment or appropriation by the factor, the right of Tims to revoke or change his intention, remained unimpaired. The rule, in substance, is thus stated by Lord Ellenborough, in Williams v. Everett, 14 East, 582. It is entire to the remitter to give and countermand his own directions respecting the remittance, as often as he pleases; and the person to whom the remittance is made, may hold it for the use of the remitter himself, until, by some engagement entered into with the person who is the object of the remittance, the factor has precluded himself from so doing, and has thus appropriated the remittance, to the use of such person. After such a circumstance, he cannot retract the consent he once has given, but is bound to hold it for the use of the appointee. To the same effect is Scott v. Procter, 3 Merivale, 652.

In this case, Walton has never consented to hold the proceeds in his hands to Bigelow's use, therefore, it remained to all intents and purposes, the money of the remitter. His willingness that the money should be applied, after he was informed of the sale, did not change the property, or take away his right to revoke the intention to give the money.

Having revoked that intention, and notified Walton not to pay the money as first directed, he is the only person entitled to receive it.

The decree is therefore reversed, and here rendered, directing Walton, to pay over the money in his hands to the defendant, Tims, with interest if it remains in his hands, and if it remains in Court, the register to be directed by the decree, to pay it over as before indicated. If the money remains in Walton's hands, and is not paid over with interest, in ten days after demand, by Tims, then execution to issue. Each of the parties to pay their own costs.

EARLE v. JUZAN.

1. One, not a party to a proceeding in the County Court upon a petition for the admeasurement of dower, cannot prosecute a writ of error to this Court, to reverse the judgment.
2. It seems that the proper remedy for one aggrieved by the judgment of the County Court, in such a case, is to remove it by *certiorari* into the Circuit Court.

Error to the Circuit Court of Washington.

THIS proceeding was commenced in the County Court of Washington by the petition of the defendant in error, to have dower assigned her in the lands of her husband, upon which the Court made an order, that a writ issue to the sheriff, commanding him to summon five freeholders, to lay off and admeasure to the petitioner, her dower in the lands mentioned in the petition, who accordingly proceeded to admeasure the dower.

From this order a writ of error was prosecuted by the plaintiff in error to the Circuit Court of Clarke county, which dismissed the writ. From that judgment this writ is prosecuted to this Court.

LESLIE, for the plaintiff in error.

ORMOND, J.—It does not appear from the record, that the plaintiff in error was a party to this proceeding in the County Court, and it is very clear, therefore, that he cannot prosecute a writ of error to reverse the order of the County Court.

The petition of the defendant in error, appears to be very defective; it does not state who are the heirs, or the tenants of the freehold, nor does it appear that any suggestion was made to the Court who they were, or notice given to them to appear and defend. Nor does it appear that notice was given to the executor, or administrator, to appear and contest the claim, or that notice was given in the gazette.

But however irregular, or illegal this proceeding may be, it

cannot be examined upon a writ of error, sued out by a stranger to the record. In the case of Cawthorn v. Weissinger, 6th Ala. Rep. 714, we had occasion to examine a question somewhat analogous to this. It is there laid down, that where a new jurisdiction is created by statute, and the Court, or Judge exercising it, proceeds in a summary mode, and not according to the course of the common law, a *certiorari* is the only remedy. If then, the plaintiff in error is aggrieved by the order of the County Court, made *ex parte* upon the petition of the defendant in error, he may obtain redress by a *certiorari* returnable into the Circuit Court; he cannot be heard upon this writ.

Let the writ of error be dismissed.

NALL v. ADAMS.

1. *Quere?*—Where a writ issued on a promissory note dated two years previously, against W. E. N. and A. M. N., describing their connection thus, "who as partners signed as W. E. & A. M. N." is it a legal presumption that they were partners when the writ was sued out.
2. Although service of process on one partner is sufficient to bring in the firm where the partnership is continuing, yet the plaintiff is not bound to accept such service, but may require all the partners to be notified of the pendency of the suit. If the plaintiff declares against all the members of the firm, he may discontinue as to those not served with process, and if he omits to take judgment against them, without a discontinuance in fact, a co-defendant against whom judgment was properly rendered, cannot avail himself of the irregularity on error.

Writ of error to the Circuit Court of Lowndes.

THIS was an action of assumpsit on a promissory note. The writ issued against all whose names are subscribed to the note, thus: "William E. Nall and Archibald M. Nall (who as partners signed as W. E. &. A. M. Nall,) and John P. Nall

and Allen Cochran, if to be found," &c. The sheriff made the following return: "Executed on W. E. & John P. Nall, 17th March, 1842, and not found as to the balance." The declaration is against all the persons sued but Cochran, as to whom the action is discontinued.

W. E. Nall and John P. Nall appeared and pleaded, the former, his certificate of discharge under the late bankrupt law of the United States; the latter rested his defence upon upon the *general issue.* The jury returned a verdict in favor of W. E. and against J. P. Nall, and judgment was rendered accordingly. There was no appearance for A. M. Nall, and in none of the proceedings subsequent to the declaration, is he noticed.

N. Cook, for the plaintiff in error, contended, that the service of the process on one partner, was, under the statute a service on all; but if this were otherwise, A. M. Nall was declared against, and there should have been a judgment by default rendered against him. The failure thus to proceed, operated a discontinuance *in toto.*

Gilchrist, for the defendant in error, conceding that W. E. & A. M. Nall were sued as partners, and yet it was competent for the plaintiff below, upon ascertaining that such was not the relationship between the parties, to discontinue as to the one not served with process, at any time. In such case, it is even made the duty of the Court, to discontinue as to the party who, it appears, is not a partner. [Clay's Dig. 324; Wheeler, et al. v. Bullard, 6 Porter's Rep. 352.]

Where it is allowable to discontinue, the judgment will not be reversed, because the discontinuance is not noted in the declaration, or elsewhere in the record. [Oliver v. Hutto, use, &c., 5 Ala. Rep. 211.]

Again; W. E. Nall pleaded for himself alone, and severed the contract if it was joint, and the plaintiff might, either before, or after judgment, have discontinued as to A. M. Nall, without affecting J. P. Nall. [1 Peter's Rep. 46; 11 Id. 86–98; 16 Id. 303; 3 Ala. Rep. 712.]

COLLIER, C. J.—It may be questioned, whether the writ and declaration so alledge a continuing partnership, between

W. E. & A. M. Nall, as to make the service of process on one, service on both. The note on which the action was founded, is alledged to have been made near two years previous to the commencement of the suit, and they are described as having signed it as partners, without averring that they were thus connected when the writ issued. Now, may not this have been true, and yet the partnership have ceased to exist before the action was instituted?

But let it be conceded that W. E. & A. M. Nall are charged as partners at the time the process issued, and it may then be asked, whether the plaintiff was bound to consider the service on one, effectual to bring both of them in Court. We think he was not bound thus to treat it, but could require both of the supposed partners, to be personally notified of the pendency of the action. This might be a measure of prudence, as by bringing them thus before the Court, the fact of partnership, if controverted or doubted, could be speedily settled, and all pretence for resorting to Chancery, upon an allegation of the want of notice, would be taken away. Having declared against A. M. Nall, even supposing he had been served with the writ, or that the service of W. E. Nall, was sufficient to bring him in, we think the plaintiff was not bound to proceed to judgment against him, if he became satisfied that he was not a partner, or wished to disavow the efficacy of the service. The Circuit Court on motion, should have allowed the plaintiff to discontinue his action against A. M. Nall, or strike his name from the declaration; and the failure thus to proceed is not an omission of which the plaintiff in error can avail himself.

In Oliver v. Hutto, 5 Ala. Rep. 211, we held, that where a writ is sued out against two joint makers of a promissory note, and served on one only, but the plaintiff declares against both, it is not necessary to enter a discontinuance on the record, or to the party not served with process; if no judgment is rendered against him, this, in legal effect, is a discontinuance, and the judgment against the defendant before the Court will be regular. [See also Wheeler, et al. v. Bullard, 6 Porter's Rep. 352.] The cases cited are conclusive in principle, to show, that a discontinuance in fact is not necessary.

It follows, from what has been said, that the judgment of the Circuit Court must be affirmed.

SALTER v. CAIN.

1. When an administrator is removed from office, he cannot regularly sue out execution in his own name upon a judgment recovered by him as administrator.
2. If an administrator, after removal from the administration, collects money recovered by him as administrator, it is money had and received to the use of the administrator *de bonis non*, who may sue the former administrator in assumpsit.

Writ of error to the Circuit Court of Lowndes.

ASSUMPSIT, by Salter, as the administrator *de bonis non* of one Speight, against Cain, for money had and received.

At the trial, it was shown that the defendant had been an administrator of the same estate now represented by the plaintiff, and, as such, had recovered a judgment against one of the debtors of that estate; that subsequently, he was discharged from the administration, and the plaintiff was appointed administrator *de bonis non* after the defendant's discharge; and after the plaintiff's appointment, the former received the sum sued for in this action, on the judgment recovered in his name. On this proof, the Court charged the jury, that the plaintiff was not entitled to recover, as the defendant was only liable on his administration bond, or in Chancery.

It was a part of the proof, that the defendant exhibited an account to the proper Court previous to his discharge, by which he was indebted to the estate, in the sum of $200 28, for which a decree was rendered in favor of the plaintiff, in right of his wife, as the widow of the intestate.

The plaintiff excepted to this charge, and now assigns it as error.

T. S. JUDGE, for the plaintiff in error, cited Clay's Digest 221, § 4.

A. B. FORNEY, contra, insisted—

1. That debts due to an intestate are required to be inventoried, and therefore the defendant was liable on his settlement

with the proper Court, and if no exceptions were taken there to his accounts, the plaintiff is not entitled to sue anywhere.

2. Under no circumstances can an administrator *de bonis non* maintain assumpsit against a former administrator; nor any suit whatever, without a decree of the Orphans' or Chancery Court, ascertaining a balance in his hands. [2 Lomax on Ex. 307, 312, 213, 214, 527; Tappan v. Cain, 12 John. 120; People v. Barnes, 12 Wend. 442; Dawes v. Boylton, 9 Mass. 337; Selectmen of Boston v. Boylston, 4 Ib. 318; Stone v. Stone, 6 Ib. 390; Moore v. Walter's heirs, 1 Mar. 488; Ordinary v. Williams, 1 N. & McC. 587; Ordinary v. Brown, 2 Ib. 213; Coleman v. McMurdo, 6 Rand 51; 2 Stewart, 466; 2 S. & P. 70; 3 Ib. 203, 348; 5 Ib. 157; 2 Porter, 328, 580; 7 Ib. 272; 8 Ib. 344; 3 Ala. Rep. N. S. 674.]

GOLDTHWAITE, J.—There is no question now as to the general principle, on which the defendant so strongly relies, and to which he cites so many authorities, but that is not involved in the present case. An administrator is certainly not responsible, except in the manner pointed out by statute, [Clay's Digest,] to a subsequent administrator, for moneys which have been collected by him, *virtute officii.* But the case is widely different, when, after his discharge, or after the revocation of his authority, either directly, by its abrogation, or by the appointment of another in his stead, he intermeddles with the affairs of the estate, and under pretence of the authority which has been revoked, he collects moneys which are due the estate. The reduction of the demand against the debtor of the estate to judgment, did not change the nature of the debt, so as to invest the defendant with an individual right to it. The debt itself remained an asset of the estate, and after the defendant's discharge from the administration, he could not legally control the execution. This is very fully shown by the case of Turner v. Davies, 2 Saund. 137. There, Davies, as the administrator of one Spicer, had sued Turner in trover, and recovered judgment. Afterwards, his grant of administration was revoked, and the administration committed to one John Spicer. Davies, after this revocation, sued out execution, and Turner brought *audita querela*, and had judgment to quash it, on the ground that Davies' authority was gone. Whether, at

common law, an administrator *de bonis non* could have the benefit of a judgment obtained by a previous administrator, is not necessary to be examined, as we have a statute upon the subject.

2. By that, it is provided, that when any suit may have been commenced on behalf of, or against the personal representatives of any testator, or intestate, the same may be prosecuted by, or against, any person, &c. who may afterwards succeed to the administration, &c., such person, or persons may, at any time, be made parties, on motion, and the cause shall proceed in the same manner, and judgment thereon be, in all respects, as effectual as if the same were prosecuted by, or against, the parties originally named. When any personal representative, or guardian, shall be displaced, all moneys due to him or her, in such right, by execution or otherwise, shall be paid to his or her successor. [Clay's Dig. 227, § 30.] It is scarcely possible that language can be more full or explicit, to transfer all rights, whether in suits pending, or to judgments recovered, to a succeeding administrator. When, therefore, after his removal, the defendant received this money, it was an unlawful act, and the right to receive it being vested, by the grant of administration *de bonis non*, in the plaintiff, it was so much received to his use.

Upon this view the error of the charge is apparent. Judgment reversed and cause remanded.

DOE, EX DEM. ALEXANDER v. COLLINS, ET ALS.

1. In an action of ejectment, a conveyance by the lessor of the plaintiff, of all his right, title and interest, to the land in dispute, made to the defendant, pending the action, may be pleaded *puis darrein continuance.*
2. Whether in such a case a technical release could be pleaded—*Quere?*

Appeal to the Circuit Court of Mobile.

EJECTMENT, for a lot in the city of Mobile, by the plaintiff against the defendants in error.

The defendants pleaded not guilty, and a special plea, that since the institution of the suit, the lessor of the plaintiffs, has released to the said defendants, his entire interest, right and claim, in the premises, in the declaration mentioned, which deed of release, sealed with the seal of the said lessor, is now in Court ready to be shown, and this the said defendants are ready to verify, wherefore, &c. To this plea there was a demurrer, which the Court overruled, and rendered judgment for the defendants, whereupon the plaintiff prayed and obtained an appeal.

The error assigned, is, in overruling the demurrer to the second plea.

HOPKINS, for the plaintiff in error, insisted, that the plea was bad, and cited 4 M. & S. 301; Adams on Ejectment, 246.

CAMPBELL, for the defendants in error, contra. The pleas were filed together, under the consent rule. [3 Ala. Rep. 200.]

It is admitted that the plea is not considered a good one in England, but it is sustained in this country. [2 Wend. 541; 9 Johnson 55; 10 Id. 464, 12 Id. 490; 7 Dana, 36.]

The whole question seems to be, whether the Court will notice the fiction by which the action is maintained, for it cannot be doubted, that in trespass to try title, the plea would be good. The Court will look through the form, to the substance. It is an insult to common sense to say, that because *John Doe* is introduced on the record, a release from the person really interested cannot be pleaded. The contrary doctrine, is an encouragement to champerty. [11 Mass. 549; 7 Id. 76; 1 Mar. 114.]

ORMOND, J.—The plea in this case, as we understand it, sets up in bar of the further prosecution of the suit, a conveyance by deed, from the lessor of the plaintiff, of his right, and title, in the premises sued for, to the defendants. Although the plea is demurred to, *oyer* is not craved of the deed, nor is it

set out, we judge of it therefore, from the allegations of the plea. So considering it, the question to be determined is, whether a conveyance by the lessor of the plaintiff, of all his right, title, and interest, in the land in dispute, made pending the cause, may not be pleaded *puis darrein continuance* in bar of the further prosecution of the suit.

The proceedings in the action of ejectment, are fictitious; but under the direction of the Court, are so moulded, as to enable the real parties to try their right to the land in dispute. Although John Doe is the plaintiff on the record, it is the title of the lessor that is in controversy; it would seem, therefore, very strange, that if the real plaintiff was willing to relinquish his title to the defendant, and thereby put an end to the litigation, that the fiction introduced for the furtherance of justice, would prevent its being done.

In the State of New York, such a plea as this is considered good, as is shown by the cases cited by the counsel for the defendants in error; but it appears to be there considered, that they differ from the English Courts. In Jackson v. McLoskey, 2 Wendell, 543, the Court says: "In England a release by a lessor of the plaintiff, is no bar. They there look to the nominal plaintiff as the real party. [4 Maule. & Sel. 301.] This Court has long been in the practice of considering the parties as they really are; the lessors as the parties in interest, and the nominal plaintiff, as an ideal and fictitious person; and we endeavour to practice on the maxim, that fiction shall do no prejudice."

We must be permitted to say, that but for this opinion so expressed, we should not have understood Lord Ellenborough in the case of Byrd v. Byre, referred to in 4th M. & S. 301, as speaking of a conveyance by the lessor to the plaintiff, of the land in dispute, to the defendant; but of a release merely, of the action. It is so stated in the brief statement of the case by the reporter. Lord Ellenborough says: "Looking to the record, we must consider those as real parties to the action, who are parties upon the record, and the real parties alone are qualified to release the action. For this purpose, the action must be taken with all its consequences, as if it was really pending between these parties. For other purposes, indeed, we treat it, as it really is, a fictitious action; but as matter upon

the record, it must be taken as if really between the parties to it." Mr. Justice Bayley says: "In Aslin v. Parkin, Lord Mansfield was not considering how the matter stood as between the parties upon record, but independently of the record. As it regards the record, we must consider *John Doe* as the real party."

These observations, evidently point to the technical difficulty, of a party releasing the action, who is not the plaintiff upon the record. We should however think, that as the plaintiff in ejectment, must have not only a good title at the commencement of the suit, but also one which is subsisting at the time of the trial, it would be admissible under the general issue, as proof that the title was not subsisting.

This was expressly so ruled, in the case of Carroll v. Norwood, 2 Harris & Johnson, 173. In that case some of the lessors of the plaintiff had parted with their title after the commencement of the suit, and before the trial. The Court say: "To recover in this action of ejectment, the lessors of the plaintiff must have a legal estate in the land, at the commencement, and trial of the cause, and therefore, as all the lessors had parted with their legal estate before the trial, except Washington Van Bibber, no recovery could be had unless for his portion, if it be competent to recover that in the present action."

It is true, that the death of the lessor of the plaintiff, he being tenant for life merely, will not abate the suit; but this is to enable the plaintiff to recover the *mesne* profits, and his costs; and in such cases the Court will award a perpetual stay of the writ of possession. [1 Bac. Ab. 13; Frier v. Jackson, 8 Johnson, 507.]

Our conclusion is, that the defence is available to the defendant, and we see no objection to its being made by *plea puis darrein* continuance. Let the judgment be affirmed.

DUPUY v. ROEBUCK.

1. An action for money had and received will lie to recover back money paid upon a judgment which has been since reversed, unless the retention of the money by the defendant, is consistent with equity and good conscience. But the equitable right to retain must grow out of, or be connected with the case in which the judgment is vacated; if the defendant has another cause of action in which he will be entitled to recover as much as he retains, he must become the actor in a suit, and have his damages ascertained by a judgment.
2. *Semble*—The plaintiff may recover in an action upon the covenant of warranty, though he voluntarily yielded to a dispossession, provided the title to which he yielded was a good title, and paramount to that of the warrantor.

Writ of error to the Circuit Court of Jefferson.

THIS was an action of assumpsit, at the suit of the defendant in error against the plaintiff. The declaration contains two counts. In the first it is alledged that the defendant below recovered a judgment against the plaintiff, on, &c., in, &c., for the sum of, &c., which judgment was reversed by this Court, on, &c., and the cause remanded; that previous to the reversal of that judgment, an execution was placed in the sheriff's hands, requiring him to make the amount thereof, and the same was satisfied by the plaintiff in this action. It is then stated that the defendant below submitted to a non-suit in that case; in consideration whereof, he became liable to refund the amount paid to the sheriff, and thereupon promised, &c. The second count is for money had and received, &c.

The cause was tried on the pleas of non-assumpsit and set off. On the trial, the defendant excepted to the ruling of the Court. It is shown by the bill of exceptions, that the plaintiff having proved the truth of the allegations, contained in the first count of the declaration, rested his case.

On the part of the defendant, it was proved that the land described in the deed set out in Roebuck v. Dupuy, 2 Ala. Rep. 535, had, before the sale by the plaintiff to the defendant, been mortgaged by John Brown to the American Asylum, &c., on the 1st March, 1821, to secure a debt therein named. Brown

also sold the same land to the plaintiff. At the time the deed was delivered from the plaintiff to the defendant, the former said, you must look to Brown to discharge the mortgage, the defendant said, Brown is not good, and the plaintiff replied, "if he is not, I am." The witness who narrated this conversation, said he considered Brown good at that time, that he had lent him money, which he repaid.

Brown failed to pay the debt to the Asylum, and the defendant discharged the same in 1838, in order to disencumber the land from the mortgage; and brought an action against the plaintiff below, for a breach of the covenant implied from the words "grant, bargain and sell," contained in the deed; alledging as a breach the mortgage by Brown, and the payment of the debt by the defendant below.

The Court charged the jury, that conceding the truth of all the testimony in the cause, and it did not furnish a defence to the action. A verdict was returned for the plaintiff, and judgment rendered accordingly.

E. W. Peck, for the plaintiff in error, insisted, that Dupuy was entitled in equity and good conscience, to retain the money he had received on the judgment which was reversed; and consequently he cannot be compelled by suit to refund it.

W. S. Mudd, for the defendant in error. The judgment which was reversed, must be regarded as a nullity, and Dupuy be treated as the holder of money which should be paid over to Roebuck, as its legal proprietor. Dupuy paid the debt to the Asylum in his own wrong, or at least under circumstances that does not authorize him to look to Roebuck for reimbursement. If he had intended to resort to the covenant in his deed, he should have submitted to an eviction. [1 Ala. Rep. N. S. 273; Id. 622; Id. 645; 2 Id. 535; 4 Id. 700.]

The money has been wrested from Roebuck, if not by fraud, certainly by force of an execution issued upon a judgment improperly obtained, and the law will not allow him to retain it. [8 Porter's Rep. 351.] If Roebuck should fail in the present case, he would have no remedy against Brown upon the covenant in the deed of the latter. The voluntary payment of Dupuy to the Asylum, would operate to deprive Roebuck of such a remedy.

COLLIER, C. J.—In Duncan v. Ware's Ex'rs. 5 Stewt. & P. Rep. 119, it was held that assumpsit for money had and received, would lie, to recover back money paid upon a judgment which was afterwards reversed. But in that case, as the reversal was for irregularity merely, and the debt was justly due, the defendant was permitted to retain the money. A similar decision was made in Green v. Stone, 1 H. & Johns. Rep. 405, where it was said that the plaintiff could not recover, unless the retention of the money by the defendant was contrary to equity and right; the defendant may resort to any equitable or conscientious defence to repel the claim of the plaintiff, and may show the justice of his original claim; so the plaintiff may prove, that he is not in law or justice liable to pay the same. "A judgment reversed, becomes mere waste paper, and the rights of the party, immediately on the reversal, are restored to the same situation in which they were, prior to the pronouncing of the judgment so reversed." In Clark v. Pinney, 6 Cow. Rep. 297, it was said, when money is paid upon an erroneous judgment, which is subsequently reversed, "the legal conclusion is irresistible, that the money belongs to the person from whom it was collected. Of course he is entitled to have it returned to him." And the action, it was determined, could be maintained, although, upon the reversal of the judgment, the cause was remanded, and was still pending in the primary court. [Strange v. Allis & Lee, 10 Wend. Rep. 354; see, also, Lazell v. Miller, 15 Mass. Rep. 207; Isom v. Johns, 2 Munf. Rep. 272: Homer v. Barrett, 2 Root's Rep. 156; Duncan v. Kirkpatrick, 13 Serg. & R. Rep. 292; Jamaica v. Guilford, 2 Chip. Rep. 103; Dennett v. Nevers, 7 Greenl. Rep. 399; Hamilton v. Aslin, 3 Watts' Rep. 222.]

The action of assumpsit for money had and received, has been sometimes assimilated to a bill in equity, and the true test to the plaintiff's right to recover, said to depend upon the fact, whether the defendant can, in equity and good conscience, retain the money sought to be recovered. Although the law is thus generally stated, the adjudged cases show what is meant by an equitable right to retain money paid upon a judgment, which was afterwards reversed. It must grow out of, or be connected with, the case in which the judgment was vacated. Thus the party who has received the money, may show that

he is entitled to recover for the cause alledged, though he mistook the appropriate remedy, or irregularities intervened which made it erroneous. But it is not permissible to justify the retention, by showing that the party has another cause of action, in which he will be entitled to recover as much as he received and retains. Such a defence could not be entertained, consistently with principle, unless it embraced a demand that was a proper subject of set off. If it was a breach of covenant for quiet enjoyment, or other unliquidated demand, distinct from the case in which the money was paid, it could not be interposed as a bar to the action. In such case, to make his demand available, the defendant must become the actor in a suit, and have the damages he has sustained, ascertained by a judgment.

In the case in which the judgment was reversed, the declaration alledged that the act of 1803 "respecting conveyances," made the legal effect of the words "grant, bargain and sell," contained in a deed conveying lands in fee simple, a covenant that the grantor "was seized of an indefeasible estate, in fee simple, in the premises, freed from incumbrances done or suffered from the defendant;" and alledges as a breach, the execution of the mortgage by Brown to the Asylum, in 1821, and its payment by Dupuy in 1838. We held, that the words employed by the statute, did not import an absolute or general covenant of seizin, against incumbrances, and for quiet enjoyment, but amount to a covenant only, against acts done or suffered by the grantor and his heirs. The right to retain the money, is not urged upon the ground, that, that action could have been supported; but it is supposed that what was said by the plaintiff in the present case, at the time he delivered the deed to the defendant, and his liability to the defendant upon his covenant of warranty, if he had been ousted, authorize him to resist a recovery. The remark of Roebuck, that, if Brown was not good and able to discharge the mortgage, certainly added nothing to his obligation to maintain his vendee in the quiet enjoyment of the land; for this he had stipulated to do, by his covenant of warranty.

The view we have taken of the case, would, perhaps, relieve us from the necessity of inquiring what state of fact must be shown to entitle Dupuy to sue upon the express covenant contained in the deed from Roebuck. We may, however, remark,

that it has been said the plaintiff can recover in an action upon the covenant of warranty, though he may have voluntarily yielded to a dispossession, provided the title to which he yielded was a good title, and paramount to that of the warrantor. There is no necessity for involving himself in a law suit in making defence against a title, which he is satisfied must ultimately prevail. He consents, however, at his own peril. If the title to which he has yielded, be not good, he must abide the loss; and in a suit against the warrantor, the burden of proof will be on the plaintiff.

So, where land sold with a covenant of warranty, had been previously mortgaged, it was held that an ouster, or expulsion, was equivalent to an eviction by legal process; and so was any lawful disturbance, or interruption, by a stranger having a paramount title. But it was necessary that some particular act should be shown, by which the plaintiff was interrupted; otherwise the breach of covenant for quiet enjoyment would not be well assigned. If a demand was made, the plaintiff, it was said, might yield to the dispossession; and that such an ouster would entitle him to his remedy on the covenant of warranty. Such an act, by a lawful and paramount claim, would disturb the enjoyment of the possession; and the plaintiff, being compelled to purchase in, another title, for his own security, would be authorized to reimburse himself, by suing for a breach of covenant. [2 Lomax on Real Property, 273, 274; see, also, Hamilton v. Cutts, 4 Mass. Rep. 349; Sprague v. Baker, 17 Mass. Rep. 586; Mackey v. Collins, 2 Nott & McC. Rep, 186; Furman v. Elmore, Id. 189; Day v. Christian, 10 Wheat. 449.]

Assuming the law to be as liberal as we have stated it, *the facts disclosed in the record* do not show that the defendant has a right of action upon the express covenant in his deed. This being the case, he has no pretence for insisting upon a retention of the money received on the reversed judgment. Whether the defendant discharged the mortgage to the Asylum, under such circumstances as entitles him to recover the amount of his vendor, by a suit either at law or in equity, we need not inquire. That question he will be able to solve, by a reference to the facts that he can establish by proof.

The consequence of what we have said, is, that the judgment of the Circuit Court must be affirmed.

WOFFORD v. ROBINSON.

1. An execution issued by a justice of the peace, which does not prescribe when it shall be returned, otherwise than by a command to make due return of it to the justice, is at most irregular merely, and affords no excuse against a motion for not returning it within the longest period, to which the discretion of the justice to make it returnable extends.

Writ of error to the Circuit Court of Pickens.

NOTICE was issued by Wofford to one Mason, a constable of said county, and to Robinson and one Mitchell, his official sureties, that a motion would be made against such of them, as should be served with notice, for judgment for the amount of an execution issued at the suit of Wofford against one Williams, and one Nabors, and placed in the hands of Mason as constable, for collection, and not returned by him according to the directions of the execution. Judgment was given by the Justice against Robinson, who alone was notified, and he appealed to the Circuit Court, which dismissed the motion, on the ground, that the declaration should contain upon its face a specified time for its return. It appears, by a bill of exceptions, allowed by the presiding Judge, that the execution indicated the time for its return only by these words, "and due return make to me."

The plaintiff prosecutes the writ of error, and here assigns the dismission of his motion as error.

B. F. PORTER, for the plaintiff in error.

W. COCHRAN, contra, cited Clay's Dig. 358, § 1; 359, § 4, 6.

GOLDTHWAITE, J.—The Circuit Court, in dismissing this motion, was probably under the impression, that the execution was not merely irregular, in consequence of the omission to direct upon its face when it should be returned, but

absolutely void. If irregular only, the officer will not be allowed to show this, to excuse his own neglect. [Anderson v. Cunningham, Minor, 48; McRae v. Colclough, 2 Ala. Rep. 74; 4 Id. 516.]

The statute regulating proceedings by justices of the peace, directs, that the justice shall issue executions "returnable at a certain time and place therein mentioned, not less than twenty, nor more than thirty days from the time of issuing the same." [Clay's Dig. 358, § 1.] But this we conceive to be merely directory to this class of magistrates, and we incline to think, that its entire omission does not affect the validity of the execution. In the present instance, the command of the execution, is to make due return of it to the justice of the peace, and what this due return is, was easily to be ascertained by the constable, if reference was had to the statute. The utmost discretion of the justice, when the defendant resides within his own county, is limited to thirty days, and therefore, after that time the constable was in default. No objection to the motion having been raised by demurrer, or otherwise, the Court should have proceeded to determine the motion, independent of the objection to the irregularity of the execution.

Judgment reversed, and cause remanded.

LESTER v. THE BANK OF MOBILE.

1. Where the record in a suit by motion recites "that the certificate of William R. Hallett, its president was produced, &c." and no objection is made in the Court below to the testimony by which the fact is established, it will in this Court be sufficient, as it is not necessary that the Court should recite the evidence by which a fact is ascertained.
2. A note discounted by the Bank after its maturity carries the legal rate of interest.

Error to the County Court of Mobile.

MOTION by the Bank against the defendant, as indorser of a promissory note for $2,627, dated 28th March, 1842, payable four months after date, negotiable and payable at the Bank of Mobile. The judgment entry, after reciting the notice, proceeds, and the said President, Directors, &c., here produces, and shows, the certificate of William R. Hallett, its President, that the said debt is really, and *bona fide*, the property of the said Bank; and it appearing to the satisfaction of the Court, that ten days notice of this motion has been given to the said Jonah D. Lester, and he saying nothing in bar or preclusion, &c., it is therefore considered, &c.

The defendant prosecutes this writ, and assigns for error—

1. That it was not proved that William R. Hallett was the President of the Bank, or that he signed the certificate, that the debt was the property of the Bank.

2. That judgment was rendered for the amount of the note and eight per cent. interest, instead of six per cent., as allowed by the charter.

The plaintiff in error filed a written argument, in which he relied upon the case of The Planters' and M. Bank v. Crawford, 6 Ala. Rep. 289.

PHILLIPS, contra.

ORMOND, J.—In Roberts v. The State Bank, 9 Porter, 312, we held, that the Courts would judicially notice who was the President of the State Bank, without proof of his signature; but in Crawford v. the Branch Bank at Mobile, at the last term, it was determined, that it was different where the officer certifying the debt, was only President *pro tem.*, in which event, proof would be necessary of his power to do the act. So, also, in the case of Crawford v. The Planters' and M. Bank, 6 Ala. Rep. 289, we held such proof necessary, because the Bank was not a public institution, but a mere private corporation.

In all these cases, the objection for the defect of proof, was made in the Court below, and there held to be unnecessary. In this case, no such objection was made, but the record recites, that "the President, &c., here produces, and shows to the Court, the certificate of William R. Hallett, its President, that the said debt," &c. Now, this is a direct affirmation, by the Court, of the existence of a fact in the cause—that Hallett is

the President of the Bank, and it has never been required, that the evidence by which the existence of a fact was established to the satisfaction of the Court, should be set out in the record. If the party against whom it is offered, supposes the evidence to be insufficient, he may have it spread upon the record, by bill of exceptions, and thus raise the question of the sufficiency of the testimony, to establish the fact.

In the leading case upon this subject, Logwood v. The Huntsville Bank, Minor's Rep. 23, it was held to be insufficient for the Court to certify, that the party had been *duly* notified; but it had always been considered sufficient for the Court to certify, that it appeared to the satisfaction of the Court, that ten days notice had been given of the intended motion, and it never has been considered necessary, that the record should disclose the testimony, by which the fact of notice was established. In the cases previously cited, the *result* of the proof was stated upon the record, instead of stating the *fact* itself which was proved. In this case, if we give credence to the record, it does appear, that Mr. Hallett was shown to be the President of the Bank.

The second assignment of error supposes, that a note discounted by the Bank, carries but six per cent. interest, after its maturity. The discount of the note, and the debt evidenced by the note, are things entirely dissimilar. The sum discounted from the note, when it is taken by the Bank, is deducted from the amount due, and the residue paid over. This discount, by the terms of the charter, cannot exceed *six per cent. per annum*, and at that rate for a shorter time. If the note is not paid at maturity, it becomes a debt due the Bank, and the statute operating upon it, regulates the rate of interest. There can be no doubt that the debt carries the legal rate of interest. The law was so decided by the Supreme Court of New York, 9 Wendell, 471, which is recognized by this Court in the Branch Bank v. Harrison, 1 Ala. Rep. 9.

Let the judgment be affirmed.

FORREST v. JONES.

1. In an action of assumpsit, for the recovery of money collected by the defendant for the plaintiff's use, the declaration alledged that the defendant "undertook and promised the plaintiff to pay that sum on demand, which though demanded, he has not done:" *Held*, that the allegation, though *informal*, amounted to a request with the omission of time and place, and was not bad on general demurrer.

Writ of error to the Circuit Court of Tuscaloosa.

THIS was an action of assumpsit at the suit of the defendant in error against the plaintiff. The declaration contains two counts; to the first, the defendant demurred, and his demurrer being overruled, he pleaded non-assumpsit; the cause was thereupon submitted to a jury, who returned a verdict for the plaintiff, and judgment was rendered accordingly.

MOORE, for the plaintiff in error insisted, that the demurrer should have been sustained, because the first count discloses a cause for which defendant was only suable after a special demand; and no such demand was alledged. [1 Chitty's Plead. 364.]

E. W. PECK and L. CLARK, for the defendant in error, contended, that if a demand was necessary, it was sufficiently alledged. [Chitty's Plead. 324; 10 East's Rep. 359; 4 Ala. Rep. 70.]

COLLIER, C. J.—The demand in the first count, it is true, is not technically alledged, yet the averment is believed to be sufficient. After stating that the defendant made his written receipt, by which he acknowledged to have received of the plaintiff, the promissory note of a third person for collection, averring that the money had been received of the debtor, and deducing thence a liability, the count affirms that the defendant "undertook and promised the plaintiff to pay that sum on demand, which though demanded, he has not done."

In the books upon pleading it is said, when a *special* request is necessary, it must be stated with time and place, by and to whom it was made, that the Court may judge whether it was sufficient; and the general averment, "although often requested," will not answer the legal requirement, if objection be taken on demurrer. But the omission of time and place can only be taken advantage of by special demurrer. [Bowdell v. Parsons, 10 East's Rep. 359; Bock v. Owen, 5 T. Rep. 490; 1 Saund. Plead. & Ev. 131–2.] The words employed in the count objected to, amount to something more than the *licet sæpius requisitus;* they are the informal allegation of a request. It is averred, that the defendant promised to pay the plaintiff the money collected for him on demand, which promise he has not performed, though the money has been demanded. The legal effect of this, is, an averment of a special request, with the omission of time and place, which we have seen cannot be taken advantage of under a general demurrer; and as this is the only form of demurring tolerated by our statute, the objection to the declaration cannot be maintained. The judgment of the Circuit Court is consequently affirmed.

PITTS v. SHORTRIDGE'S ADMR'S.

1. A set off due to the maker of a note, by one who has become beneficially interested in it, without the legal title by indorsement, cannot be enforced, so as to defeat the right of a subsequent indorsee to recover on the note.

Writ of error to the Circuit Court of Talladega.

Assumpsit by Eli Shortridge against Pitts, on a note made by him, payable to one Townsend, and by the latter indorsed to Shortridge.

The defendant pleaded—1. Non-assumpsit. 2. Payment. 3. Set off; upon which issue was taken to a jury. 4. That the note sued on was the property of George D. Shortridge, and was not the property of the plaintiff. 5. That previous to the commencement of this suit, the plaintiff had transferred and delivered the said note to one George D. Shortridge, and whilst the same belonged to the said George D. the defendant became the owner of a note made by him, for the sum of ——, dated ——, payable to Spyker & Cummings, by whom it was indorsed to one Spyker, who indorsed it to the defendant. Which said note, so indorsed, the defendant offered to set off against the note set out in the declaration, whilst the same was the property of, and in the possession of, the said George D. This note was past due at the commencement of the suit, and is for a greater sum than the one sued for. The plea concludes with an averment that the note offered to be set off, was valid as such, and was a payment of the note sued on. The plaintiff demurred to these two last pleas, and his demurrer was sustained by the Court.

At the trial, the defendant gave evidence of a conversation had between Eli Shortridge and the defendant, relative to the note sued on, in which Shortridge said he had nothing to do with it; that the note was turned over to his son, George D. to raise money upon, and the defendant must settle with him. Also, that during the time the note was in possession of George D., payment was several times demanded for his benefit, and by him the note was sent to an attorney for collection; when it was presented to the defendant, he produced the note offered to be set off, the same as set out in the plea, and proposed to discount the one from the other. The note was offered under the plea of set off, and rejected. It was then offered under the plea of non-assumpsit, to prove that the note sued on was the property of George D., and not the property of the plaintiff, at the date of the indorsement of the note, of which it was proved said George D.'s attorney had notice, and at the date of the commencement of this suit. And also, to prove, under the plea of payment, that whilst the said George D. had the possession, and the presumptive evidence created by such possession, of the note sued on, the defendant had acquired a demand against the said George D. which, in effect, was a payment of

the note sued on; but the Court refused to let the note be read to the jury for any purpose. The bill of exceptions here states that the defendant excepted, but immediately afterwards proceeds to set out, that a witness certified that the note sued on, was delivered by the elder to the younger Shortridge, to raise money for his use and benefit, but with the understanding and condition, that if the latter failed in raising the money on the note, he was to return it. There was no evidence that this understanding was communicated to defendant, but there was evidence, on the contrary, which tended to show that this note was presented to the defendant, and its payment demanded in the name of said George D. and as if it was his absolute property. Afterwards, and before the commencement of this suit, the note was offered to be returned by the younger to the elder Shortridge, when the latter instructed the former to place it in the hands of the present attorneys for collection, for him, the said Eli, and this direction was obeyed.

The transcript does not show any suggestion of the death of Shortridge, upon the record, but in the caption of the judgment entry, Pearson and Shortridge, Jr. are named as his administrators, and judgment is rendered in their names.

The errors assigned are, that the Court erred—

1. In sustaining the demurrer to the pleas.
2. In rendering judgment against the defendant.

W. P. Chilton, Bowdon, and B. F. Porter, for the plaintiff in error, after conceding that the fourth plea could not be sustained, under the decision of Beal v. Snedicor, 8 Porter, 523, and Jennings v. Cummings, 9 Porter, 309, argued—

1. The fifth plea is good within the principle settled in Harbin v. Levi, 6 Ala. Rep. 299; Tipton v. Nance, 4 Ib. 194.

2. The note should have been left to the jury, in connection with the evidence, which went to show that the note was the property of the younger Shortridge. In excluding it, the Court, in effect, decided the question of fact, arising on the other evidence.

3. There is no warrant for rendering judgment in favor of the present parties, for it does not appear how they came so, on the record.

T. D. Clarke and S. F. Rice, contra, cited Kennedy v.

Manship, 1 Ala. Rep. N. S. 43; Stocking v. Toulmin, 3 S. & P. 35, as conclusive of the plea. As to the other question, there is no evidence set out from which it could be inferred that George D. Shortridge had any property in the note, and therefore, the one as a set off was not admissible for any purpose.

GOLDTHWAITE, J.—The assignments of error do not raise some of the questions to which our attention has been called, by the written arguments submitted, and for this reason our opinion will be confined to the demurrer to the fifth plea—the concession that the fourth one is bad, leaves this the only point in the case.

It is unnecessary now to decide, whether, if the note sued on was, in fact, the property of the younger Shortridge, the set off held by the defendant against him, would be admissible, because the plea does not put the defence on this ground; that merely asserts that the note sued on once belonged to him, or, rather, that he was invested with the beneficial interest in it, by the transfer and delivery of it, by the plaintiff below, without denying that the legal interest, at the commencement of the suit, was as stated by the declaration. It, then, merely presents the question, whether an off set, held by the maker of a note, against one who holds the beneficial interest in it, without the legal title, can be enforced so as to defeat the right of a subsequent indorsee to recover upon the note.

In Stocking v. Toulmin, 3 S. & P. 35, it was held, that the general statute, which gives assignability to promissory notes, with the restriction that the defendant shall be allowed the benefit of all payments, discounts and sets off, made, had, or possessed, against the same, previous to notice of the assignment, in the same manner as if the same had been sued by the payee therein, did not give the right to set off a debt due from an intermediate assignee, against a subsequent assignee. To the same effect is Kennedy v. Manship, 1 Ala. Rep. N. S. 43. Those decisions are conclusive of this plea, as here the attempt, is, to have the benefit of a set off against one, who never had the legal title to the note, but was merely beneficially interested in the sum to be collected; an interest, too, which ceased before the commencement of the suit. It is not pretended that any right existed, by the common law, to interpose such a set off

as this, but if it was, the judgment in Robertson v. Breedlove, 7 Porter, 541, shows, that even where a note is transferred after its maturity, the holder is chargeable only with the equities arising out of the transaction, for which the note was given, and is not affected by a debt in the nature of a set off.

It will be seen that we have given no consideration to the bill of exceptions; this is for the reason before stated, that it is not opened by the assignments of error.

Our conclusion is, that the demurrer to the plea considered, was properly sustained. Judgment affirmed.

CROMWELL & JOHNSON, ADM'RS. v COMEGYS.

1. A voluntary bankrupt is not a competent witness for the assignee in bankruptcy, to establish a debt due the bankrupt.

Error to the County Court of Sumter.

Assumpsit by the defendant in error, as assignee in bankruptcy, against the plaintiffs in error.

From a bill of exceptions it appears, that the suit was on an account surrendered by one Slade in bankruptcy. That Slade was a bankrupt under the clause of the late act providing for voluntary bankruptcy—that his debts were $15,000, and the assets surrendered by him $1,000. Under these circumstances, Slade's deposition was offered, to prove the debt, and admitted by the Court against the objection of the defendants, to which they excepted, and which they now assign as error.

Bliss & Baldwin, for plaintiff in error.

Reavis, for the defendant in error. The English authorities are not in point. The 6th of Geo. 4th, chap. 16, makes no provision for voluntary bankruptcy, and the bankrupt may have a surplus after paying his debts, therefore he is an incompetent witness, on the ground of interest. A bankrupt in

the condition of Slade, has no interest whatever in the event. There is no reason for supposing that the creditors will not claim their demands, and that the money may belong to the bankrupt.

ORMOND, J.—In England the bankrupt is not a competent witness for the assignee, to increase the funds, by establishing the debt, unless he releases all his interest to the assignee, in the surplus which may remain after the debts are paid. [Butler v. Cooke, Cowp. 70; Carlisle v. Eddy, 2 C. & P. 234.] It is however urged, that our bankrupt law permitting voluntary bankruptcies, differs from the English law, as in such a case, the presumption must be, that there is no surplus, and that in this particular case, there can be none, as the debts are fifteen thousand dollars, and the effects of the bankrupt delivered up, only one thousand.

We think there can be no doubt. that the bankrupt would be entitled to the surplus in the hands of the assignee, if not claimed by the creditors. It certainly would not be the property of the assignee, and if suffered to remain in his hands a sufficient length of time after the estate was settled, to raise the presumption that it was abandoned, the bankrupt might recover it from the assignee. In this view of the case he had a direct interest in the event, which should have excluded him from being a witness.

A contrary decision would lead to injurious consequences. In the mode in which the bankrupt law has been administered, by the sale of the effects of the bankrupt, the debts due the bankrupt, are frequently held in trust for him, and it would not perhaps be hazarding much to say, that such is the fact in a majority of cases. This fact it would not be in the power of the debtor to show. It is no answer to say, he could enquire of the bankrupt on his *voir dire*, the opportunities for evasion, and subterfuge, would be so great and so impossible of detection, that it would afford but little security. We think therefore, the rule contended for, would be found in practice productive of great injustice. On this ground alone however, we might not feel authorized to exclude the bankrupt; but for the reason, that he has a direct interest in the event, he should be excluded. Let the judgment be reversed, and the cause remanded.

THE STATE, EX REL. EASLEY v. SPENCE.

1. The sheriffs elected under the act of the 12th January, 1833, "for the organization of certain counties therein named," were entitled to their offices for the constitutional term of three years, although their successors may have been elected, at the general election in August preceding the expiration of that period. And the successors may continue in office for three years, calculating from the time that the term of their predecessors expire; unless they entered upon the discharge of their official duties sooner, which it seems they might do any time after their election, and in virtue thereof.

Writ of error to the Circuit Court of Talladega.

W. P. Chilton, L. E. Parsons and B. F. Porter, for the plaintiff in error.

S. F. Rice, for the defendant.

COLLIER, C. J.—This was an information in the nature of a *quo warranto*, at the relation of Easley, who was elected sheriff of Talladega, at the general election holden on the first Monday in August, 1844, against the defendant, who was exercising that office under a previous election. The facts are these: the first sheriff chosen in Talladega upon the organization of the county, was elected on the first Monday in March, 1833, and continued in office for three years, although his successor was elected on the first Monday in August, 1835; and each of his successors, down to the defendant, held the office for the same period, although a sheriff was chosen to succeed them at the general election, preceeding the times they respecttively ceased to act. The relator insists, that he became entitled to the sheriffalty of Talladega, from the time of his election—that the defendant is an intruder; and the information thereupon calls upon him, to show by what warrant he exercises the office, &c. It is alledged, that the relator executed the bond with surety, and took the oaths prescribed by law. These facts, with some others, not deemed material, are admitted to be true, and the cause being submitted to the Circuit

Court to decide, without the aid of a jury, the information was dismissed at the relator's costs.

On the 12th January, 1833, the legislature passed "an act for the organization of certain counties therein named." Among these, are the county of Talladega. The sixth section enacts, "that there shall be elections held in the aforesaid counties, on the first Monday of March, at the different precincts, (or at such place as the persons herein authorized to hold said election, shall appoint,) for the election of a clerk of the Circuit Court, a clerk of the County Court, a sheriff, a tax collector, and assessor, and four commissioners of roads and revenue, for each of said counties. Which election shall be held by one justice of the peace, and two householders in each election precinct, to be conducted in the same manner, and under the same rules and regulations as elections are, for electing members of the general assembly."

The twenty-fourth section of the fourth article of the constitution provides, that "a sheriff shall be elected in each county by the qualified electors thereof, who shall hold his office for the term of three years, unless sooner removed, and who shall not be eligible to serve, either as principal or deputy for the three succeeding years. Should a vacancy occur subsequent to an election, it shall be filled by the Governor, as in other cases, and the person so appointed shall continue in office until the next general election, when such vacancy shall be filled by the qualified electors, and the sheriff then elected shall continue in office for three years."

It is insisted by the counsel for the relator, that the act of January, 1833, as its title indicates, was temporary; and does not confer the sheriffalty upon those elected under its provisions for any definite period; and as there could not be a second election on the first Monday in March, in the counties embraced by it, the sheriff first chosen, would be superseded by persons elected to succeed them on the first Monday in August preceding the expiration of three years. This argument assumes too much. It may be conceded that the statute was intended for a temporary purpose, and when it subserved the exigency which induced its enactment, it ceased to be operative. But does this prove that the tenure of the officers for whose elections it provided were also temporary? If so,

what limit shall be prescribed to them? The consequence adduced from the assumption, that the act was not permanent, we think is not defensible. If it was, the more reasonable conclusion would be, that the sheriffs and clerks held their offices until successors were chosen at the general election in 1833. There is no warrant for this or any kindred inference. As then the constitution declares the official tenure, we must hold that the election in March, (though at an unusual time.) conferred upon the sheriffs first elected, the right to their offices for three years. The constitution has prescribed the length of the term, the legislature cannot add to, or diminish it; much less should the judiciary, by a construction resting upon no firm basis, undertake to attribute to a statute such an effect.

It is certainly true, that all officers eligible by the people, or the legislature, are indebted to the election for their offices; but it by no means follows, from this truism, that they are to hold their offices from the time of the election. The tenure of several of our judges expired in June, 1843, and they were elected at the annual session of the legislature preceding. Yet no one supposed that the election operated so as to vacate their old commissions. No such opinion was entertained by the judges themselves, and some of them, did not take the oaths anew, until their old term was about closing, or perhaps had actually expired.

But it is supposed, by the relator's counsel, that if the construction we have indicated be correct, and the old sheriff should vacate his office by death, resignation, &c., the Governor would be authorized to make an appointment, or the office would continue vacant up to the first of March. If such an appointment was made, the only limitation to the tenure of such appointee, is declared by the constitution to be, "until the next general election;" and an embarrassing question would arise in determining, whether the executive commission would not postpone the right of the sheriff elect, to enter upon his office, until by its terms it expired. We think no difficulty can arise upon this point. Although the defendant is entitled to perform the duties of sheriff until the expiration of three years from the time he entered upon the office, yet the relator would become his successor if he should vacate it sooner, and

the contingency could not arise, (if the relator accepts the office,) upon which the Governor is authorized to appoint.

The sheriff elected by the people, whenever there shall cease to be an incumbent, *de jure*, is authorized to enter upon his official duties. His election entitles him to the office *as a matter of right*, from the time that the constitutional term of his predecessor expires, and to exercise it sooner, if the latter dies, resigns, &c. He is not elected like a senator in congress, with reference to some prescribed period in the future, when his tenure shall commence; there is nothing that restrains him from acting immediately, but the fact, that there is an incumbent lawfully in office. This has been the practical construction acted upon, in respect to all who have been elected sheriff of Talladega; for the defendant and his successor, each qualified on the 19th of February, and entered upon their official duties. On that day, as a matter of right, the relator may claim his office.

What we have said, will sufficiently show, that the judgment of the Circuit Court is correct. It is therefore, affirmed.

ALEXANDER, ET AL. ADM'RS. v. KNOX & CO.

1. A witness cannot excuse himself, or be excused from giving evidence, although his answer may expose him to a civil action.

Writ of error to the Circuit Court of Lowndes.

Assumpsit by Knox & Co. against William Alexander and others, as administrators of Edmund Alexander, on a note made by their intestate with D. Durden and Thomas Durden. The defendants pleaded that the note sued on, was not executed by their intestate; and at the trial, on this issue, the plaintiffs

offered Thomas Durden, one of the makers of the note, as a witness to prove the signature of the intestate; or that the note was signed by his authority, and according to his instructions.

This witness, on his *voir dire* stated that he had been discharged as a certified bankrupt since making the note; that the note was made for his benefit, to aid him in the purchase of goods, and that it had been taken in payment for such goods furnished to him. On this the defendants objected to witness, as incompetent to testify, on the ground of interest; and the witness himself refused to give evidence in favor of the plaintiffs unless compelled by the Court to do so.

The Court ruled that the witness was competent and must answer.

The witness then testified, that he met with the intestate and his wife in a store, in Montgomery; that he applied to the intestate to sign the note as his surety, and then was told by him that he could not sign it himself, but his wife would sign it for him; that witness went to Mrs. Alexander, in the store, and said to her that Mr. Alexander had requested the witness to come to her to get her to sign his name to the note; but the witness did not know that Mr. Alexander heard the conversation with his wife, or that he saw the note signed by her. They were all, however, together in the store, and Mrs. Alexander, on this application, signed the note, with the name of the intestate.

To all which the defendants excepted; and it is now assigned as error—

1. That the Court erred in deciding that the witness was competent.

2. In compelling him to testify against his own interest.

Thos. Williams, I. W. Hayne, and J. P. Saffold, for plaintiffs in error, insisted, that Durden is liable to Alexander's administrators, if they are compelled to pay this debt, notwithstanding his certificate, 1 Phil. Ev. 61; Maundrill v Kennett, 1 Camp. 408, note; and, therefore, ought not to have been compelled to testify to revive a liability, from which, as the case stands he was discharged.

Elmore and Fair, contra, argued—

1. That interest does not disqualify, when a witness is called

against his interest. [Greenl. Ev. 455, § 410; Williams, et al. v. Jones, 2 Ala. Rep. 314.]

2. A witness is bound to answer, although his answer may subject him to a civil action, or pecuniary loss, where his interest is adverse to the party calling him. [Greenl. Ev. 503, § 452; 1 Phil. Ev. 277; Cowen & Hill's notes, 739.]

3. The witness, however, in this case, was liable to no one, nor could his liability, once gone, be revived afterwards in favor of the intestate's administrators, by their payment of the debt. Our bankrupt act, in this respect, is not governed by the English decisions.

GOLDTHWAITE, J.—We shall not, at present, enter on the question, how far the witness, Durden, may be liable to the administrators of Alexander, if they should be compelled to pay the amount of the note executed under the supposed authority from the intestate, because that would require a construction of the late bankrupt law; and for the reason that we consider him a competent witness for the plaintiff, even if the effect of his evidence is to revive a debt against himself, which we shall concede, for the purpose of this opinion, to be now barred.

It is a matter of singularity, that the question, whether a witness objecting to answer, could excuse himself on the ground, that, by answering, he would subject himself to a civil action, or pecuniary loss, was never solemnly decided in England until the precise question was put to the judges, upon the impeachment of Lord Melville, in 1806. Four of the judges then gave opinions, that a witness, under such circumstances, might excuse himself, and ought not to be compelled to answer; the other eight judges held the contrary opinion. Lord Eldon and Lord Ellenborough among the latter, seem to consider the question even as somewhat offensive; for the former observes, in no measured strain, "that, although his experience was equal, not only to any individual judge on the bench, but to all the judges, with their collective practice, yet he never knew a single objection to have been taken to an interrogatory proposed, because the reply to it would render the witness responsible to a civil suit." Lord Ellenborough, too, insisted, that during the entire course of a life devoted to the practice of the law, and to the duties of the bench, he did not remember a single in-

stance where the objection had been taken. Mr. Justice Chambre, puts the matter thus: The public must not call on a witness to give evidence, or do justice, between A and B, because such evidence might prevent the witness from acting unjustly by C or D, to whom the witness might wish to act unjustly, or from whom he should wish to withhold a just debt. [See opinions of the Judges, 1 Hall's Am. Law Jour. 225.] Owing to the difference of opinion between the judges, a declaratory act of parliament was passed. In this country the rule has been settled in most of the States, in conformity with the opinions of the majority of the English judges. [See cases collected in Cowen & Hill's Notes, 739.]

As a rule of the common law, it has never, we think, admitted of serious question, that a witness is bound to answer any pertinent and material interrogatory, although his answer may have the effect to render him liable to a civil suit. That there may be exceptions to this, as a general rule, is quite possible, but the case on the record, certainly is not entitled to be so considered.

It is not the testimony of the witness which gives the right of action, if such a right is conceded under the bankrupt law, but the payment made, as his surety, and this right of action would be precisely the same, if the witness was entirely silent, for the same matter might be shown by other evidence.

We are very clear there is no error in this particular, whatever there may have been in the finding upon the evidence.

Judgment affirmed.

CHANDLER v. CRAWFORD.

1. A penalty created by statute for the omission to do a particular act, cannot be relieved against in Chancery, any more than at law; but Chancery may entertain a bill for the discovery of facts, showing either a sufficient excuse, or to establish fraud in the party, seeking to enforce the penalty.

2. A sheriff against whom a judgment is rendered for failing to make a return upon an execution, cannot have relief in Chancery, upon the ground alone that the defendant in execution was insolvent.

3. A plaintiff in execution having obtained a judgment against a sheriff, for failing to return the execution, the latter, may in equity, set off a debt due him from the former, he being insolvent, and the debt not being a legal set off, on the motion against the sheriff.

Error to the Chancery Court of Perry.

The bill was filed by the plaintiff in error, and alledges, that on the 13th April, 1842, he, being sheriff of Perry county, an execution came to his hands in favor of the defendant, against The Manual Labor Institute of South Alabama, for $1,649 37, besides costs. That at the time he received the execution, the Institute was wholly insolvent—that this fact was well known to the defendant, yet, at his desire the complainant indorsed a levy upon certain lands, the numbers of which were furnished by defendant—that there was not time to sell the lands, and he was about to return that fact upon the execution, when he was informed by the clerk of the Court, James C. Harrell, that he need not return it, as the defendant had informed him he did not wish it returned; and charges that he believes defendant so informed Harrell.

That defendant afterwards moved against him, for failing to return the execution, and obtained a judgment against him and his sureties, said Harrell being excluded by the Court, from testifying, because he was one of the sureties on his official bond.

He also charges that he had paid to the defendant, on the execution, $360 72; also, that he owes him $203 46, due by note, subject to a credit of $40, for which he claims an off set. He also charges that the defendant is insolvent.

The defendant, by his answer, denies giving any authority to the sheriff not to return the execution—denies that the Institute is insolvent—admits that it was embarrassed, but that he believes it had property fully sufficient to satisfy his execution; insists on his judgment against the sheriff as a bar to his setting up in Chancery, matters cognizable upon the trial at law; denies his indebtedness to complainant, except the note of $203 46, and also his right, if such debts existed, to make them the subject of a set off, in Chancery; and demurs to the bill. He also admits his inability to meet his own engagements.

Harrell was examined as a witness, and proved that the defendant waived the return of the execution, and that he considered the Institute insolvent.

H. C. Lea, also proved, that in his opinion, no money could have been made upon the execution at the time, from the insolvency of the Institute.

The Chancellor rejected the testimony of Harrell, because he was one of the sureties of the sheriff, and a party to the judgment, and considering the equity of the bill, if any existed, positively denied by the answer, and but one witness proving any thing in relation to the insolvency of the defendant in execution, dismissed the bill, from which this writ is prosecuted.

Thos. Chilton, for plaintiff in error.

Davis and Peck, contra.

ORMOND, J.—Harrell being one of the sureties of the sheriff, was clearly incompetent, from interest, to testify in his behalf, at law; and in equity, he certainly could not be a witness, as the judgment was rendered, not only against the sheriff, but also against him, as one of his sureties.

We consider the answer of the defendant, as virtually admitting his insolvency; he also admits the existence of a debt from him to the sheriff, as charged in the bill, of $203 46, subject to a credit of $40, and for this, we think, he is entitled to a set off in equity. As between the original parties, the insolvency of one, may be a ground for the interposition of a Court of Chancery, to prevent irreparable injury. [Pharr & Beck v. Reynolds, 3 Ala. Rep. 521; Long & Long v. Brown, 4 Ib. 622; and Cullum v. The Bank, Ib. 21.] In this case, the defendant being indebted to the sheriff, has obtained a judgment against him, in a case in which he could not make the debt a set off, and if he is compelled to pay the judgment, will, from the insolvency of the defendant, in all probability, lose the debt. Under such circumstances he is entitled to an equitable set off, which the Chancellor should have allowed.

The remaining questions are of much more moment, and difficulty. Whether the insolvency of the "Institute," can be shown by the sheriff, as an excuse for omitting to return the execution, and by what means the insolvency is to be established.

The remedy against a sheriff, for failing to return an execution, is provided by statute. By the act of 1819, Clay's Dig. 206, § 22, a remedy was given to the plaintiff, to recover by motion, money which the sheriff had made and failed to pay over, "or for failing to return the execution." A previous statute, passed in 1807, Clay's Dig. 217, § 80, gave to the Court power, on motion, to fine the sheriff five per centum per month on the amount of the judgment, for a failure to return it; and a statute passed in 1826, Clay's Dig. 218, § 86, authorized the Court to issue an attachment, for an omission to return the execution.

At an early period of this Court, a construction was put upon the first of the acts here cited, that the sum to be recovered of the sheriff, was the amount of the execution, McWhorter v. Marr, 1 Stew. 53, which was re-affirmed in Neale v. Caldwell, 3 Stew. 134. In Hill v. The State Bank, 5 Porter, 537, the present Court considered the question as to the proper measure of damages in such a case, and although it adhered to the former decisions, it expressed great dissatisfaction with them, but would not depart from a construction so long acquiesced in. There the question arose at law, upon the motion. Now it is presented in Chancery, and the question is, whether equity has the power to relieve in such a case?

What is the true intent and meaning of these statutes, giving remedies against the sheriff, for omitting to return an execution? The evident design was to procure the performance of the act. To accomplish this, he is exposed, by the omission, to a summary proceeding, at the instance of the plaintiff, which is evidently purely penal in its character; as the question is, not whether the plaintiff has been injured, by the neglect of the sheriff, but whether he has omitted to do the act, which, by law, he was required to do. We have frequently expressed our individual opinions, that it was impossible to suppose that it could have been contemplated by the legislature, that the sheriff should pay the debt, as the consequence of his omission to do an act, when such omission was no prejudice to the plaintiff, and the performance would have conferred no benefit. Influenced by these considerations, the suggestion was made, in Harris v. Bradford, 4 Ala. Rep. 221, that possibly equity might relieve in such a case.

Upon mature reflection we are satisfied, that a Court of equity cannot relieve against the penalty, so long as the construction heretofore put upon the statute, is permitted to remain. It does not stand upon the same footing, with contracts entered into by the parties, but is a declaration of the legislative will, which Courts of Chancery cannot dispense with, any more than Courts of Law. [Jemison v. Cozzens, 3 Ala. Rep. 636; see, also, 2 Story's Equity, 555, § 1326; and cases cited.]

However unjust, or against conscience, such an attempt may be, it is not in our power to relieve against it. So long as the law is permitted to remain upon the statute book, it must be enforced, both at law and in Chancery. Equity will entertain a bill, for a discovery of facts, to show that the penalty never attached, or was produced by the fraudulent conduct of the adverse party, or by circumstances beyond his control. Such, indeed, was in part the equity set up in this bill, but it was denied by the defendant, and is not proved.

The result of our opinion is, that the decree of the Chancellor must be so far modified as to allow the complainant a credit, by way of equitable set off for the amount of the debt, admitted to be due to him by the defendant. In all other respects it is affirmed.

Let the defendant in error pay the costs of this Court. The complainant is properly taxed with the costs of the Court of Chancery, as he did not offer to pay what was really due.

FERNANDEZ AND WHITE v. THE STATE.

1. Upon an indictment for a felony, the solicitor announced the State ready for trial, when the accused answered that they were also ready, no objection being made to the jury, the indictment was read to them, and the trial proceeded to its close; the judgment entry recited that the prisoners were arraigned, pleaded *not guilty*, &c.: *Held*, that the refusal of the primary Court to strike out, on motion of the accused, so much of the entry as affirmed the arraignment and plea pleaded, was not an error; and that such a neglect in pleading was inferable, as authorized the Court under the ninth section of the eleventh chapter of the "Penal Code," to cause the plea to be entered.

Writ of error to the Circuit Court of Montgomery.

THE plaintiffs in error were indicted for robbery. The judgment entry recites the arraignment of the prisoners, the plea of not guilty by them, the submission of the case to the jury, who returned a verdict of guilty, &c. Upon this entry being read in Court, the prisoners' counsel objected to the same, and as the ground of his objection, offered the admissions of the solicitor to the following effect, viz: When the cause was called, the solicitor announced, the State was ready for trial, when the prisoners' counsel answered, that they were also ready; and no objection being made to the jury by either party, the solicitor read to them the indictment in his opening address, and then proceeded with the examination of witnesses, to the termination of the trial, without objection by the prisoners. Upon these facts, the prisoners' counsel moved to strike from the entry all that part of it, which affirmed, that they had been arraigned and pleaded; but the motion was overruled, and thereupon the prisoners excepted. Judgment having been pronounced upon the verdict of guilty, a writ of error was prayed and awarded by this Court.

T. WILLIAMS, for the plaintiff in error, made the following points: 1. The statute authorizes a party charged with a felony, to except to the ruling of the Court against him; and the

bill of exceptions will be looked to, not only to ascertain the legal question determined, but the facts, also. [The State v. Jones, 5 Ala. Rep. 666.] 2. The prisoners should have been arraigned, and required to plead before they were put upon their trial. The act (Clay's Dig. 462, § 9) shows, that they should have been called on for a plea, before not guilty was entered for them. This matter should have been attended to by the Court, and the record shows that the requirement of the law had not been complied with. 3. The prisoners announcing themselves ready for trial, was not equivalent to, nor did it dispense with a formal arraignment and plea. [4 Bla. Com. 323; 2 Hale's P. C. 218; 1 Ala. Rep. N. S. 655.]

Attorney General for the State. No formal arraignment of the prisoners was necessary. [5 Sergt. & R. Rep. 317; 1 Chitty's C. Law, 414—419.] The declaration by the prisoners, of their readiness for trial, and allowing the case to be submitted to the jury, and the examination of witnesses proceeded in without objection, was a waiver of the arraignment and plea, or admitted that the law, as it respects them, had been complied with. [2 Ala. Rep. 287.] It is contended, that the motion to amend the record was addressed to the discretion of the Court, and whether rightly overruled or not, furnishes no ground for the reversal of the judgment. But, if the law be otherwise, it is insisted, that the error in the entry was not sufficiently shown to the Court; it is said, that it was admitted by the solicitor, the Court however, does not affirm the truth of the admission, and may have acted upon the recollection that the fact was otherwise. If there was a mistake it should have been shown by affidavit. [Cooper v. Bissell, 15 Johns. Rep. 318; State v. Underwood, 2 Ala. Rep. 476.]

COLLIER, C. J.—The judgment entry in this case is confessedly regular; it recites the arraignment, plea, and trial of the prisoners in consecutive order, but it is objected, that this recital is untrue in point of fact, as is shown by the bill of exceptions. It is not indispensable to the regularity of the conviction, that the accused should be formally arraigned. If he is advised of the offence with which he is charged, and is prepared, without hearing the indictment read, to answer it, he may plead. Here, it seems, that the prisoners were in Court,

and when the solicitor announced the State ready to proceed with the case, their counsel answered, that they were also ready for trial. This amounts to a recognition, that they were the persons charged in the indictment in the case called, and were prepared to defend themselves against it. This was equivalent to, and in law, a sufficient substitute for an arraignment in due form.

Giving to the admission of the solicitor, the effect which the prisoners' counsel claims for it, and it appears that the plea of *not guilty*, was entered for them by the Court, before the case was submitted to the jury. In the State v. Hughes, 1 Ala. Rep. 655, we say, although no formal arraignment of one charged with a criminal offence may be essential, yet the case must be put in a condition for trial before the jury is sworn; that until the prisoner was called on for a plea, it could not be known whether there would be an issue of fact, or what the issue (if any.) The statute then in force, provided, that if any person on his arraignment for a capital, or inferior offence, shall stand mute, or will not answer to the indictment, the plea of not guilty shall be entered for him on the record, and in either case the Court shall proceed to the trial of the accused, as if he pleaded not guilty, &c. [Aik. Dig. 119, § 27.] This provision has been since superseded by the ninth section of the eleventh chapter of the "Penal Code," which is in these words: "If any person on his arraignment, shall refuse, or neglect to plead, the Court shall cause the plea of not guilty, to be entered of record, and proceed to the trial of the cause." [Clay's Dig. 462.] The first act we see, required the Court to be active, and call upon the accused to answer the indictment before the plea of not guilty was entered for him; that, now in force, authorizes the plea to be entered and the trial proceeded in, not only upon the refusal, but if there is a neglect to plead. In the case before us, the prisoners declared their readiness for trial when the cause was called, made no objection to the jury which had been selected, but tacitly assented that the solicitor might proceed. To have placed the case in a condition to be tried, it was the duty of the prisoners to have interposed a plea, and not having done so, as we must intend, they were guilty of such neglect as authorized the Court to cause the plea of not guilty to be entered for them.

It must be observed that the judgment entry is entirely regular, and the question is, whether it should be modified, upon the admission made by the solicitor. Taking it to be strictly true, and it proves nothing more, than, that there was no formal arraignment, and that the prisoners did not plead, but instead of showing that there was not such a case of neglect as authorized the plea of not guilty to be entered, it leaves the reverse to be fairly inferred.

It results from what has been said, that the judgment of the Circuit Court must be affirmed.

ALEXANDER, ET AL. v. FISHER.

1. A tenant in dower, in this State, has the right to change woodland into arable, if the proportion of woodland is such, that a prudent farmer would consider it best to reduce a portion of it to cultivation; and the general criterion by which to determine whether waste has been committed, is where lasting damage has been done to the inheritance, or its value depreciated.
2. Such a tenant, however, has not the right at pleasure, to cut down or otherwise injure the growing timber, although she is entitled to what is necessary for firewood, and for the repairs of buildings and fences, on the dower lands.
3. *Quere?*—If she has the right under any pretence to destroy groves of timber, or trees planted for shade or ornament—but when such are destroyed, Chancery will not decree compensation, in the absence of proof of value.

Writ of error to the Court of Chancery for the 12th district of the Southern Division.

The bill is filed by the heirs at law of Edmund Alexander, deceased, against Fisher, who intermarried with the widow of said Alexander, to restrain him in committing waste in certain lands, which were attached as dower to his wife, as the widow of the said Alexander.

The dower lands consist of four hundred and ninety eight acres, including the late residence and dwelling house of Alexander, about two hundred acres of which are alledged to be cleared, and under fence, for cultivation, and the remainder uncleared and uninclosed, with the exception of some small portions of lots or pasture grounds. The waste is asserted to have been committed in cutting down and clearing, in the year 1841, of ten or more acres of the woodlands; in pulling down and removing a line of fence inclosing the old lands; in destroying a fine grove of walnut timber; and in doing considerable damage to the growing timber.

It is also asserted that the uncleared lands are broken, composed of light and sandy soil, which will soon be destroyed by cultivation, and that Fisher, when requested by one of the complainants to stop this waste, declared, that he should cut, and clear, as he pleased, and work the lands with a view to his own interest, disregarding that of those who might come after him, and that at the time of filing the bill, he was preparing, by cutting out the undergrowth, to clear more land.

It is asserted, the grove of walnut trees alledged to have been destroyed, was left by Alexander, to break the fogs and damps arising from the river, the grove lying between that and the mansion. Some of the lands cleared by Fisher, it is alledged, were enclosed in lots, for pasture, and the trees left for timber, shade and ornament, and those he is about to clear are adjacent to those last described.

The answer admits that Fisher holds the lands described as the dower estate of his wife; that one hundred and eighty acres is cleared land, but was not under a sufficient fence to warrant its cultivation, unless repaired. In the fall of 1841, or the early part of 1842, he cut down 6 28-100 acres for the purpose of procuring fire wood, and getting rails; which land is, at the time of his answer, in cultivation. The south line of the land allotted for the dower of his wife, runs nearly east and west, and passes the plantation, or cleared part of the lands; this line is about three-eighths of a mile long, and is the boundary on the south; it was without a fence, and in order to cultivate that part of the plantation, one was necessary the entire length of the line; this fence either had to be made with new rails, or from those taken from some other part of the plantation, and when

made, inclosed about one hundred acres of the dower lands. On the north side of this piece of land, there was an old fence, which the defendant removed, and put up on the south line, above described, and with which he inclosed the entire field. Some walnut trees were growing along this old line of fence, and those, together with all the growth on the old line of the fence, were cut down, and the land prepared for cultivation. These walnut trees were from six to eight inches in diameter, and none of them were nearer than three hundred yards of the house. It was necessary to repair the fences on the farm, and for this purpose many new rails were required. The defendant had no other means of getting them, than from timber growing on the dower land, and the farm would have been valueless to him without these repairs. He asserts, that he has erected gates, and added other improvements on the land, and has managed it in a prudent manner, so that his possession of it, has added to its value at least five hundred dollars. He admits that a part of the land is rolling, but insists that other portions are level, and not likely to be soon injured by cultivation. When one of the complainants informed him of the desire of the heirs, that no timber should be cut, he may have said that he intended to enlarge the farm, but he denies that he has committed waste, or has any intention to do so. He expects to clear some of the land for cultivation, and has cut a part of the small growth for firewood, on that part intended to be cleared, and insists upon his right to do so.

He alledges ignorance of the intention with which the walnut trees were planted, but insists they were useless to keep the fog arising from the river from the dwelling house, as the river was north from the house, and the trees south; neither could they make a shade for the dwelling, or be an ornament to it, inasmuch as they were at too great a distance for a shade, and out of view from the house, as there was a pond between that and the trees, in which grew large oaks, which prevented the walnut trees from being seen.

With respect to the inclosed lots, charged in the bill as matters of waste, the defendant insists, that one of them was a horse lot, near the negro houses, and distant two hundred and fifty or three hundred yards from the dwelling house. This lot he considered as injurious to the health of his slaves, and

therefore he put it in cultivation; it contains about an acre of land, and some oak trees growing upon it have been deadened. He insists further, that a considerable portion of the cleared lands allotted as dower, has been cleared for a long time, and that some of it is worn out, and that, unless he is permitted to clear other land for cultivation, the estate will be of little or no value to him.

The answer concludes with a demurrer to the bill, showing for cause, that his wife is not made a party defendant to it.

Several witnesses were examined, but their testimony, in the main, sustains the case made by the defendant's answer, except, that the weight of evidence is, that there is something to fear on the score of health, from cutting down the timber nearest the house, and that the trees cut down added somewhat to the beauty of the place.

The Chancellor considered that no waste had been committed in a legal sense, and refused to enjoin the defendant from clearing more land, as it was not shown that it was intended to reduce the proportion of woodland improperly.

The bill having been dismissed, the complainants insist here, that they are entitled to an injunction against further waste, as well as compensation for that already committed.

Thos. Williams, Jr. for the plaintiff in error.

R. Saffold, contra.

GOLDTHWAITE, J.—We can perceive nothing in the proof in this cause, or in the admissions of the answer, which will warrant a different decree from that rendered by the Chancellor.

It is true, that in England, it is waste for a tenant in dower to convert woodland into arable, Coke on Litt. 53, b.; but it is evident that the rules which govern and define waste in an old, well settled, cultivated country, have either no application, or at best a very remote one, to a new country, where the timber is of little or no value, and where its destruction is always the preliminary to successful cultivation. Even in England, that which is waste by a tenant in one county, is not always so in another. So, too, with us, it is very evident that in some parts of the State, a destruction of timber would be of lasting

injury to the inheritance, whilst in other parts, the same act would be beneficial.

A number of adjudications have been made in our sister States upon this subject, which show that the subject matter is capable of no general and fixed rule, from the great diversities which exist between the several States, both with respect to the articles produced, as well as in the manner of cultivation: to say nothing of the different and relative values of lands and timber. [Findlay v. Smith, 6 Mun. 134; Cranch v. Puryear, 1 Rand. 258.] In Hastings v. Crankleton, 3 Yeates, 261, the Court held that a tenant in dower may clear woodlands, if the land cleared bears a proper relative proportion to the whole tract. To the same effect is Parkins v. Coxe, 2 Haywood, 339; and we presume many other cases involving the same principle may be found in the reports of other States.

The Supreme Court of Tennessee, in Owen v. Hyde, 6 Yerg. 334, assert, that the general criterion by which to determine whether waste has been committed, is, to ascertain whether lasting damage has been done to the inheritance, or its value depreciated. That Court also recognized the right of a tenant in dower, when the land of the dower estate was old and worn, to clear new land, if the proportion of woodland was such that a prudent farmer would consider it best to reduce a portion of it to cultivation, thereby to relieve the old land from excess of cultivation. We entirely concur in this view of the law of waste, as peculiarly applicable to many parts of our own State.

2. It is proper, however, to remark, that we desire not to be understood as asserting, that a tenant in dower, has the absolute right, at pleasure, to cut down or otherwise destroy the growing wood upon the dower lands. Doubtless all such tenants are entitled to house bote, fire bote, and fence bote; in other words, to the timber necessary for fire wood, and for the repairs of the buildings and fences upon the dower lands; but beyond this, it seems that the tenant's right does not extend, except it be within the rule before recognized, to wit: that the change from woodland into arable, is productive of no lasting injury to the inheritance.

It will probably be found also, that such a tenant has no right, under any pretext, to destroy groves of timber, or trees

planted for shade or ornament; and with respect to the walnut trees, spoken of in the pleadings, if the allegations of the bill had been supported, and they had been of any determinate value, the heirs might have been entitled to compensation. But the proof leaves it doubtful whether the ancestor planted them for any definite purpose; and there is an entire absence of proof as to any value, for which Chancery will entertain a bill for compensation.

We are satisfied that the Chancellor came to the proper conclusion, and his decree is affirmed with costs.

COUCH, ET AL. v. COUCH.

1. A will of personal property will be established, though not written or signed by the testator, or attested by witnesses, if made according to the directions of the deceased, and approved, and not signed from physical debility, or the near approach of death.
2. It is strong evidence of capacity to make a will, that its provisions are suitable, and made in accordance to previous expressed determinations.

Error to the Orphans' Court of Franklin.

Application, by the defendant in error, for probate of the will of Sarah Couch, which was resisted by the heirs at law. The will is as follows:

State of Alabama—*Franklin County:*

I, Sarah Couch, of said State and county, do, of my last will and testament, will unto my nephew Henry M. Couch, the following property, to wit. one negro girl named Violett, about twelve years of age, and one negro boy named Wiley, about ten years old: also, two cows and three calves, and one bed and furniture, and other household and kitchen furniture,

too tedious to mention, and one wood clock, to have and to hold to himself, his heirs and assigns forever. Nevertheless in testimony whereof, I have hereunto set my hand and seal, this 21st day of June, 1841.

her
Test: SARAH ⋊ COUCH, [SEAL.]
J. W. MULLINS. mark.

J. W. Mullins, the subscribing witness, being examined, stated in substance, that being sent for to do some writing for the deceased, he went to her house, and found her much enfeebled. That he asked her if she wished him to do some writing, and if she desired to give her property to Henry M. Couch, that she answered yes. That he then went into another room, when she said, never mind—all will be right. That witness went into another room, and consulted with the persons present, and went again to Sarah Couch, and asked her, if she wished him to write her will, and if she wished to give her property to Henry M. Couch? She answered that she did; and witness then stated, that would do, and went into another room, and prepared the writing offered for probate. After it was written he read it to her, at her request, and asked her if it would do? She said she reckoned it would do. Witness then told her she must sign it, or make her mark to it. That he placed the paper before her, and the pen in her hand, and that with his assistance, she made her mark. She appeared very careless and indifferent to what she was doing. That she was lying on her back, and he does not know whether she turned her face to the instrument or not, when she made her mark. This was about two or three o'clock, P. M. and she died the same day, between seven and and eight o'clock, P. M. The deceased did not call on any one to witness the will, but he attested it voluntarily.

The father of H. M. Couch, died when he was very young, and he lived with the father of the deceased, she being the housekeeper. That after the death of the old man, the deceased and H. M. Couch continued to live together until her death.

R. M. Clarke was the attending physician. He called to see the deceased on the day of her death, between nine and twelve o'clock, and conversed with her; she talked rationally,

and appeared to be in her proper mind. He saw that she would inevitably die, and declining giving any more medicine, informed her friends that she would probably die by, or during the night. That J. W. Mullins, and H. M. Couch, talked to him about writing a will for the deceased, which he declined to do, alledging his want of skill. That the deceased was very feeble and sick at the time, but there were no indications of any affection of the brain.

Thomas Mullins saw and conversed with her about twelve o'clock, on the day she died; she appeared in her proper senses.

Charity Mullins did not think the deceased was of sound mind. About two days before the will was made, she supposed she saw her father and mother in the yard—heard the deceased say she wanted some writing done, and advised Henry M. Couch to get Mullins to do it. When the will was written, and the pen handed to her to sign it, she either threw it down, or dropped it, and it was by the help of Mullins that she made her mark.

Nancy Mullins testified, that for several days before her death, she appeared sometimes to be of sound mind, and at others not: When her fever rose she appeared somewhat phrenzied, at other times not. On the day before she died, she called H. M. Couch to her bed side, threw her arms about his neck, said she was about to die, and that she wanted him to have every thing she had; she was then in her proper mind.

Jane Barker saw her occasionally during her last illness, and thought she was in her right mind. Saw her the day before she died, and heard her tell H. M. Couch, she wanted him to have all her property. Heard her say on the day she died, that if Dr. Clarke would not give her any medicine, he could write some for her. On being asked by Mrs. Mullins, what kind of writing she wanted, she answered, some writing done like father's. Mrs. M. then told her Clarke was gone, but that William Mullins could do it for her, and she then told H. M. Couch to go, and bring Mullins. On the day she died, heard her tell her negro to be a good boy, and that Henry would treat him well.

Minerva Barker saw her the day before, and the day on which she died, and thinks she was in her right mind. The

day before she died asked witness to bring her a cucumber, and on the day she died, asked witness if she had brought it.

Rachael Yocum heard deceased say, before she was taken sick, that she intended giving all her property to H. M. Couch, assigning as a reason, that he was as near to her as a child. Heard her say, that if the Doctor could do nothing for her, he could do some writing, and when asked what kind of writing, said the same her father had made. Mullins was sent for at her request, and when he asked her what she wanted done with her property, she said she wanted Meredith to have Violet; and upon inquiring what she wanted done with the balance of her property, she said she wanted him to have all she had. Considered that she was of sound mind.

Mary E. Oglesby heard the deceased say, in 1837, and frequently since, that she intended to give all her property to H. M. Couch—that she had raised him, and expected him to live with her, and take care of her declining years.

Elly Martin heard deceased say, H. M. Couch was as near to her, as if he was her own child, and that she intended to give him all her property. One of her sisters present, said, she had as well give the property to her, that Henry would not thank her for it; to which she replied, he will thank me as much as any of you. This took place in the year 1840.

R. A. Martin proved the same facts.

This being all the evidence, and the parties not desiring a jury to pass upon the facts, the Court established the will, and ordered it to be recorded. From this decree this writ is prosecuted, and it is now assigned for error, that the Court erred in establishing the will.

Nooe, for the plaintiff in error, insisted, that two witnesses were necessary to establish a will at common law, and referred particularly to the case of Brown v. Moore, 6 Yerger, 272. He also contended, that there was not sufficient proof that the deceased was of disposing mind and memory.

Cooper, contra, contended, that a will of personal property was not void for want of witnesses. He cited 1 S. & P. 30; 4 Ala. Rep. 255; 25 Law Lib. 52; 19 Vesey, 508. He further argued, that the evidence was very satisfactory to show, that the deceased was sane when the will was made.

ORMOND, J.—From the course pursued in this cause, in the Court below, this Court is now to determine, whether, from the facts in evidence, the paper offered for probate, is the last will and testament of Sarah Couch.

To the validity of a will of personal property, it is only necessary that it be made by, or according to the directions of the deceased and be in writing. It is not necessary that it be witnessed, or written, or signed, by the testator; if drawn up according to his directions, and approved by him, it may operate as a valid will. [2 Blackstone Com. 501; 1 Roberts on Wills, 148; Lovelass on Wills, 316, and cases cited.]

The will in this case is written, and was drawn up according to the directions of the testatrix, as is shown by the proof of several witnesses. The disposition which she made of the property, was such as she had repeatedly declared for several years previously, she intended to make, and which she put in execution as soon as she discovered that her recovery was doubtful. On the evening before her death, she told the object of her bounty, that she was about to die, and that she intended to leave him all she had.

On the succeeding day, when the Doctor by declining to give her any more medicine, and from the lamentations of her friends, finding out her true situation, she wished the Doctor to do the writing for her, and finding he had left, or was unwilling, directed another person to be sent for. When he came, she declared her intention, and when the will was written, approved it, and no doubt we think can be entertained, that it was a valid testamentary disposition.

If it were necessary to sustain the will, we should be inclined to think, that the proof establishes, that it was executed by her; but whether she made her mark to the paper, or not, it is equally operative, as a testament of personal property; and it appear that personal property alone, was intended to be given. The cases are numerous, where instructions, or heads for a testament, have been established as a last will, upon proof, that the intention to die testate existed, and the party had been prevented by accident, or surprised by death, from executing it, in a more formal manner. The case of Huntington v. Huntington, 2 Phillimore, 213, decided by Sir John Nichols, is a strong case in point.

The testator being taken ill, went to see his solicitor, and dictated to him his will, which the latter wrote down, and read over to him, and which he approved, and directed him to take home and make a fair copy, and bring early the next morning, for him to execute. On the next morning he was suddenly attacked by a fit, and rendered incapable of executing it, and so continued until he died.

This was established as his will, notwithstanding there was then in existence a previously executed written will, attested by three witnesses. The learned judge considered the case as free from all difficulty, or room for doubt. [See also Dickinson v. Dickinson, Ib. 173, and Nichols v. Nichols, Id. 180; Cogbill v. Cogbill, 2 H. & M. 467; Walker v. Walker, 1 Merivale, 503.]

In this case, leaving out of view the execution, or attempt to execute, the instrument, it is certain that the deceased did not intend to die intestate, and that the will was drawn up pursuant to her directions and approved by her; and if by the near approach of death, or by want of physical ability, she was unable to execute it, it is, notwithstanding, valid as a testament.

It is equally as clear from the proof, that she was of disposing mind and memory. One witness speaks of the deceased laboring under a delusion, two days previous to her death, which was probably owing to an exacerbation of fever; be this as it may, it is evident, from the testimony of all the witnesses, that she was generally sane, and especially on the day of her death. The attending physician, whose testimony is much more to be relied on, than that of the ignorant persons around her, testifies expressly to her mental capacity, although greatly debilitated. The will itself being made in conformity to a fixed determination, entertained and expressed for years, is the strongest proof of her capacity. Even in the case of confirmed lunacy, a will drawn up by a lunatic, was held of itself, to afford proof of a lucid interval, from the internal evidence afforded by the fitness of its dispositions, and its being made in conformity with an intention expressed, previous to the insanity. [See the case of Cartwright v. Cartwright, 1 Phillimore, 90, and the cases collected by Stock on *non compos mentis*, 52.]

Upon every view which we have been able to take of the case, we think the paper was correctly admitted to probate, as the last will of the deceased, and the judgment of the Court below is therefere affirmed.

HUNT, USE, &c. v. STEWART.

1. Where a suit is brought in the name of the payee of a promissory note, for the use of a third person, to whom it appears to have been regularly indorsed, the form of the action is an acknowledgment that the indorsee is the proprietor of the paper, and the suit cannot be supported by the payee.
2. It will be intended that the payee and indorsee of a promissory note is the same person, where the only difference in the names, is, the insertion of the initial of a middle name in the indorsement.
3. It was decided in this State, at an early day, and such has been the continuous practice, that the Court cannot order the plaintiff to be nonsuit against his consent, and whenever he submits his case to a jury he must be understood to insist upon a verdict: it is consequently erroneous to coerce a nonsuit, though the plaintiff's proof may have been insufficient, and he has not been prejudiced thereby.

Writ of error to the County Court of Coosa.

This was an action of assumpsit, at the suit of the plaintiff in error, on a promissory note. The cause was tried on the plea of non-assumpsit, payment and set off. On the trial, the plaintiff excepted to the ruling of the Court. It is shown by the bill of exceptions, that the plaintiff offered in evidence a note of the following tenor, viz: "One day after date, I promise to pay Irvine Hunt, two hundred and fifteen dollars, this 21st of March, 1842. Richard Stewart."

On which is the following indorsement—"Mr. Richard Stewart, you will please pay the within note to James R. Powell. October 8, 1842. Irvine P. Hunt."

The defendant objected to the admissibility of the note, because it appeared by the indorsement that the nominal plaintiff, Hunt, was not the legal proprietor thereof; which objection was sustained, and the note excluded from the jury. The plaintiff then proposed that the indorsement should be considered as stricken out, and then moved to permit him to strike it out, and thus in one form or other make the note evidence under the declaration; but both these propositions were overruled by the Court. No evidence was adduced, that the party for whose use the suit was brought, was prosecuting the suit, though the defendants so insisted, and the plaintiff's counsel conceded the fact. The judgment entry recites, that the plaintiff having failed to maintain his action a nonsuit was ordered, and a judgment was rendered against the plaintiff for costs.

W. W. Morris, for the plaintiff in error, insisted that it could not be intended that the person who appeared as the indorser of the note, was also its payee; especially as there was a difference in the names. The indorsement should have been allowed to be stricken out and the note read to the jury. [Chitty on Bills, 256, notes I. and 1.] The nominal plaintiff should be presumed to be the proprietor. Besides all this the plaintiff should not have been nonsuited, but the jury should have returned a verdict.

S. P. Storrs, for the defendant. The indorsement of the note passed the legal interest to the indorsee, (Clay's Dig. 381, § 6,) and suit thereon should have been brought in his name. [Chitty on Bills, 9 Am. ed. 256–7.] So long as the indorsement remains on the note, the payee cannot sue on it in his own name. [Welch v. Lindo, 7 Cranch, 159.] And it is not allowable to strike out an indorsement after a cause is called for trial. [Bowie v. Duvall, 1 G. & Johns. Rep. 175.]

COLLIER, C. J.—In Pitts v. Keyser, 1 Stewt. Rep. ~~182~~ 154, the plaintiff declared on a promissory note on which he was the payee, but on adducing it as evidence to the jury, it appeared that he had made an indorsement thereon in full, to a third person. The defendant objected that the right of action was in the indorsee, but the Court refused thus to instruct the jury. This Court affirmed the judgment, saying that it would be pre-

sumed that the property in the paper was in the payee, although it had been indorsed to another person; that it would be intended that the indorsement was made to facilitate the collection, or some such purpose, and the note had been returned without the object being effected. But this presumption, like all others, might be rebutted by proof, and if it should be made to appear by evidence, that the property was really in the indorsee, the plaintiff could not recover. In Johnson, use of Stone, v. English, Id. 169, the Court cite with approbation its previous decision, and say, that if the payee bring an action in his own name on paper indorsed by him, for the use of the indorsee, the form in which the suit is brought is an acknowledgment that the latter is the proprietor of the note, and shows that the indorser cannot sue for the recovery of the money due thereon. [See also Dugan v. The U. S. 3 Wheat. Rep. 182; Welch v. Lindo, 7 Cranch's Rep. 159; Burdick v. Green, 15 Johns. Rep. 247; Hartwell v. McBeth, 1 Har. Rep. 363; Perkins v. Catlin, 11 Conn. Rep. 213; U. S. v. Barker, Paine's Rep. 156; Picquet v. Curtis, 1 Sumner's Rep. 480; 1 Dall. Rep. 193; 2 Id. 147; 1 Yeates' Rep. 99; 4 Johns. Rep. 31; Bowie, use of Ladd, v. Duvall, 1 G. & Johns. Rep. 175.]

But it is insisted by the plaintiff that the indorsement purports to be made by Irvine P. Hunt, and the payee has no middle name. We think it must be intended that an indorsement on a bill, purporting to transfer it, is *prima facie* genuine. [Blair v. Pollock, 6 Litt. Rep. 208.] The fact that the plaintiff's name appears in the body of the note, as well as in the writ and declaration without the initial P. cannot be allowed to control the rule, which maintains that the insertion or omission of a middle name, is not a misnomer. If the payee and indorser are different persons it was easy to have shown it, and it was incumbent upon the plaintiff to countervail the presumption that such was the fact, by evidence. The suit then being brought in the payee's name, (as we must suppose,) for the use of the indorsee, cannot be supported.

It was certainly an unusual practice for the Court to have ordered a nonsuit after the cause was put to the jury; if the evidence was insufficient to entitle the plaintiff to recover, the verdict should have been against him. The bill of exceptions sets out all the proof adduced by the plaintiff, without stating

that he had other testimony in reserve. It is clear from what has been already said, that he failed to make out his case, and the Court would have been authorized to instruct the jury to find against him; and the jury could not without a disregard or a misapprehension of duty, have refused to do so. This being the case, the plaintiff is not prejudiced, and if the point was *res integra*, we might be inclined to consider the nonsuit as a mere irregularity, which will not avail on error; but it was holden by our predecessors at a very early day, that it was not allowable for a Court unless directed by statute to order the plaintiff to be nonsuit. They say, "if the plaintiff refuses to submit to a nonsuit, and insists that the jury shall render a verdict, the Court has no power to direct a nonsuit, and cannot enforce its opinion otherwise than by instructions to the jury, and by awarding a new trial, if the verdict be contrary to the charge." [Smith, Adm'r, v. Seaton, Minor's Rep. 75.] The plaintiff insists upon a verdict whenever he puts his case to a jury, and does not consent to a withdrawal. Upon the authority of the case last cited, the judgment is reversed and the cause remanded.

COMSTOCK, ET AL. v. MEEK & CO.

1. A plea in abatement filed within three days next after the filing of the declaration is within time, if the trial is not thereby delayed, and it is not error to refuse to strike such a plea from the file.
2. Where the return of the commissioner states the deposition of a witness to have been taken by virtue of the commission, it is sufficient to authorize the reading of the deposition, although a certain place is named in the commission where the witness is to be examined, and the return is silent as to place. In order to suppress the deposition, an affidavit is necessary that the party attended at the particular place.

Writ of error to the Circuit Court of Tuscaloosa county.

ASSUMPSIT by Mrs. Comstock and one Johnson, as executrix and executor of Edward Comstock against Meek & Co. for goods, &c., sold by their testator. The defendants pleaded in abatement, that Johnson was dead when the suit commenced. The plaintiffs demurred to this plea, and afterwards, when the demurrer was overruled, took issue upon it, and the defendants had a verdict. The plea was not filed at the appearance term of the Court, nor was it indorsed by the clerk, as required by the rule of the Court. The plaintiffs thereupon moved to take the plea from the file, but this motion was refused, on a showing that it was filed within three days after the filing of the declaration.

At the trial, a deposition was offered in evidence, the commission for which directed the commissioners to cause the witness to come before them, at the office of Lewis Thomas, in the city of New York, on the 15th day of March, 1844. The caption of the deposition has the venue of the city and county of New York, and states that one of the commissioners, by virtue of a commission, &c. the witness was examined at the time and place hereinbefore mentioned; and the return is dated the 15th March, 1844. The deposition was objected to, by the plaintiffs, on the ground that it did not appear to have been taken at the office of Lewis Thomas, as required by the commission. The objection was overruled, and the plaintiffs excepted.

They now assign as error—

1. The refusal to strike out the plea.
2. The overruling of the demurrer.
3. The admission of the deposition of the witnesses.

PECK & L. CLARK, for the plaintiff in error, insisted—1. That the twelfth rule of practice must govern the plea, whether the declaration is, or is not, filed. If the parties wished to plead in abatement, they should have required the declaration to be filed. 2. The return to the commission does not show the deposition was taken at the place required, and therefore it should have been excluded.

T. D. CLARKE, contra. As to the first point, relied on the statute, Clay's Digest, 332, and the twelfth rule does not abrogate

it, but merely provides a mode by which to verify the time of filing the plea. The plea was in time, as there was nothing to plead to, until the filing of the declaration. [Sturdevant v. Gaines, 5 Ala. Rep. 435.] Under no circumstances can error be assigned on a refusal to strike out a plea. [Sally v. Gorden, 5 Ala. Rep. 78; Bell v. Reynolds, 3 Ib. 57]

2. To sustain the admission of the deposition, Sandford v. Spence, 4 Ala. Rep. 237; Dearman v. Chapman, 5 Ib. 202; Luckie v. Caruthers, Ib. 291; 4 John. 130, were cited.

GOLDTHWAITE, J.—1. The twelfth rule of practice was not intended, nor has it the effect, to limit the operation of the statute, which directs the course and time of pleading. By that the general rule is provided, that the declaration shall be filed within the three first days of the appearance term, and the defendant's plea must be filed within the three days next thereafter, but the pleadings are to be made up during the term to which the process is returned, unless the time is extended by the consent of the parties, their attorneys, or by the direction of the Court. [Clay's Dig. 332, § 111.] The twelfth rule merely directs that no plea in abatement shall be received, if objected to, unless by indorsement of the clerk it appears to have been filed within the time allowed for pleading. [Ib. 610, § 12.] The time allowed for pleading may be changed by the consent of the parties, and it here appears that the consent was given to enlarge the time for filing the declaration; at least such is the inference most favorable for the plaintiffs, as otherwise they were in default by the omission to file it, within the time provided by the act. If we understand the time as extended by consent, then the plea was within time, if filed in three days after the declaration, and if there was no consent, then it was alike within the time, as no plea can regularly be filed when there is no declaration to plead to. [Sturdevant v. Gaines, 5 Ala. Rep. 435.] Although the inference here is, that there was some consent rule entered into, we are not to be understood as expressing the opinion, that in any similar case the inference of consent could be so extended, as to allow the defendant to evade a trial, on the pretence that the declaration was not filed three days before the call of the cause for trial.

2. The exception to the deposition seems to fall within the

principle of the cases cited by the defendants. In the cases of Sanford v. Spence, 4 Ala. Rep. 237; Dearman v. Chapman, 5 Ib. 202; and Luckie v. Caruthers, Ib. 291, the certificates of the commissioners showed that the depositions were taken *pursuant* to the commissions respectively issued, but in all of them the manner of pursuing the commissions was not stated with precision or exactness. Here the return is, that the deposition was taken by virtue of the commission. The remark made by us, in Sanford v. Spence, that it is difficult to perceive how an examination can be pursuant to, which is not in uniformity with, the directions of the commission, apply with equal force to the term, by virtue of the commission. The only plausible reason urged for the suppression of the deposition is, that the party might have attended at the place named for the purpose of cross-examination; now if this fact had been shown by affidavit, and the return of the commissioner was not as exact as it might be, this would, doubtless, be a sufficient reason to suppress the deposition, verified alone by such a certificate. As it stands uncontradicted, the inference is, from the certificate, that the deposition was taken by virtue of the commission, and that all its requisitions were complied with.

Judgment affirmed.

BURNS v. HINDMAN.

1. If a matter of defence arises after issue joined, it must be pleaded *puis darrein continuance;* if it arises pending the suit, but before issue joined, it is pleadable in bar to the further maintenance of the suit.
2. A submission to arbitration, which speaks of an action for a false imprisonment, will include an action on the case for the malicious use of process.
3. An award which discharges each from all demands of the other, and dismisses all suits, is not conditional, but is conclusive in favor of, and against each of the parties.

Error to the Circuit Court of Benton,

ACTION on the case, by the plaintiff, against the defendant in error, for maliciously suing out a *capias ad satisfaciendum.*

The defendant pleaded the general issue, with leave to give any matter in evidence which might be legally pleaded in bar, and general replication; upon the trial, the defendant offered in evidence, a submission to arbitration between him and the plaintiff, and award, as follows:

"Whereas, the undersigned, Abraham S. Burns, being about to institute a suit against Thomas C. Hindman, for false imprisonment, and both parties having had an interview, with a view to bringing about an amicable settlement of the difficulty, above alluded to, as well as all others that may have existed heretofore, and the interview aforesaid having resulted in the following conclusion, to wit: that the above named Burns and Hindman do mutually agree, and do hereby select, Lawrence Brock and John M. Crook, as arbitrators, in all matters of difficulty between them, the parties above named, including the suit aforesaid, which said Burns hereby agrees is to be dismissed, the writ being now in the hands of the sheriff of Benton county; and the parties aforesaid, do by these presents agree, and bind themselves, to abide the award of the arbitrators named, which shall be considered in full satisfaction to both parties, from this time, henceforth, and forever, in relation to all matters of difference of every description, up to the date hereof. In witness whereof, &c. this 18th April, 1843. Said arbitrators to meet this evening, at some convenient place at Jacksonville, or on any other day, which may best suit their convenience."

Signed and sealed by the parties.

The defendant proved, that at the instance of the parties, and after examining and hearing them, the arbitrators made the following award, in writing:

"The undersigned, arbitrators, according to the within obligation, from the facts before them, award, that all suits between the parties be withdrawn, by the party commencing them, and that they be mutually relieved from all amounts held or claimed against each other, of whatever nature they may be, this 18th April, 1843." Signed by the arbitrators.

That the award was stated to the parties, with which they professed themselves satisfied.

The plaintiff objected to the reading of the submission, and award, to the jury, to each separately, which objection the Court overruled, and the plaintiff excepted, The plaintiff further moved the Court to instruct the jury, that the award was no bar to his recovery in this action; which charge the Court refused to give, and charged, that if they believed the testimony, the award was a bar to a recovery in this action, to which the plaintiff excepted, and which he now assigns as error.

RICE, for the plaintiff in error, contended, that the evidence was not admissible under the issue, but should have been pleaded *puis darrein continuance.* [4 East. 502; 2 Saund. P. & E. 723; 20 Johns. 414; 6 Com. Dig. 121, 131; 1 Chitty P. 695; 6 Ala. Rep. 399.]

The Court erred in assuming that the award was made before the commencement of this suit. [3 Porter, 231; 1 Ala. Rep. 90.]

The matters embraced in this suit were not referred to the arbitrators. [7 Porter, 158; 9 Johns. 38; 12 Johns. 456.]

The submission extended only to all matters in difference, at the date of the submission, and it was not shown that this action was then in difference between these parties. [4 Term, 146; 6 Id. 607; 15 East. 213; Watson on Awards, 146.]

The defendant should have averred a performance on his part. [5 Mason, 244.]

W. B. MARTIN, contra.

ORMOND, J.—There is a distinction as to a matter of defence arising after the issue joined, and such matter when it arises pending the suit, but before issue joined. In the former case it must be pleaded *puis darrein continuance;* in the latter it is a plea in bar to the further maintenance of the suit, and may be pleaded with other pleas in bar, whilst the former is a waiver of all previous pleas. [Sadler v. Fisher, 3 Ala. Rep. 203.] From this it appears, that the testimony of the submission and award were properly admitted under the general issue. But if this were not so, we think the agreement of the parties broad enough to admit the evidence, if only admissible under a plea of *puis darrein continuance.*

We are now to consider the effect of this submission, and

award. It is contended by the plaintiff's counsel, that this controversy was not submitted to the arbitrators, because the suit then spoken of, is said to be an action for *false imprisonment*, and that this is an action on the case, for the malicious use of process; and that although all matters in difference between the parties, was submitted to the decision of the arbitrators, it will not include this action, which is not specifically named or described.

The submission recites, that the parties had an interview, and had agreed upon an amicable settlement of a suit, which Burns was about to institute against Hindman, for false imprisonment—that the suit was to be dismissed, and all matters of difference between the parties, of every description, up to that date, were to be left to the arbitrament of two persons, who are named. We think it cannot well be doubted, that this is the action spoken of in the submission, as an action for false imprisonment. It is an action on the case, for maliciously arresting the body of the plaintiff, upon a *ca. sa.* and certainly this might well be considered by the parties as an action for false imprisonment. The writ, too, bears the same date with the submission, and until the presumption is repelled by contrary proof, the inference is irresistible, that this is the action referred to in the submission.

But whether it is, or is not, the same action there referred to, the result is the same. If it was the same action, then, as one of the conditions of the submission, it was to be dismissed; if it was not the same, it was certainly a matter of difference between the parties, as the writ was sued out the same day, and by the express decision of the arbitrators, was to be dismissed by the plaintiff; so that any possible construction of the submission would lead to the same result. We think, however, that it would be most unreasonable to suppose, that this is not the action which the plaintiff, upon going into the submission, agreed to dismiss. See the case of Gray v. Gwennap, 1 Barn. & Ald. 106.

There is nothing in the objection that the award is conditional, and that the defendant cannot have the benefit of it, without showing that he had performed it. An award may certainly be conditional, and to entitle the party to the benefit of it, he may be compelled to show that he has performed, or of-

fered to perform, the condition; but this award is not of that character. It does not award any thing to either party, but discharges each from all demands of the other, and dismisses all suits. It is, then, conclusive of these matters, in favor of, and against each; and if the defendant had any suit pending, against the plaintiff, at the time of the award, which does not appear, either from the submission, award, or by evidence *aliunde*, the award is conclusive in favor of the plaintiff to procure their dismissal.

Let the judgment be affirmed.

FLOURNOY v. CLEMENTS AND ANOTHER.

1. A writ was placed in the hands of a sheriff appointed by the Governor to fill a vacancy, on the 8th of March, on the 12th of the same month the writ was executed on one of the defendants, and on the 30th on the other; on the 18th of March a sheriff elected by the people was invested with the office: *Held*, that the service of the writ was good, being made by a sheriff *de facto*, such a short time after his successor was qualified, that it could not have been generally known that he was superseded.

Writ of error to the Circuit Court of Randolph.

A WRIT of *capias ad respondendum* at the suit of the plaintiff in error, against the defendants, was issued on the 8th of March, 1844, returnable to the Circuit Court of Randolph, to be holden on the seventh Monday after the fourth Monday of that month; and was executed on one of the defendants the 12th, and the other the 30th of March. On motion of the defendants, the service of the writ was vacated and set aside, upon the ground, (as supposed,) that the person who executed it was not an officer authorized by law to execute process. The facts, as shown by the record, are substantially as follows,

viz: At the election in August, 1842, Robert Caskey was elected sheriff of Randolph, qualified and entered upon the discharge of his duties as such; in June, 1843, he was removed by the judge of the County Court, and this order of removal reversed by this Court at its term holden in January, 1844. On the 18th March, Caskey executed another official bond, which was approved by the judge of the County Court; this bond was given and approved without any previous order, other than the order of removal and the action of this Court thereon, yet Caskey, immediately, on its execution resumed the discharge of his official duties.

In June, 1843, Samuel Carpenter was appointed and commissioned to fill the vacancy caused by the removal of Caskey, "for the term prescribed by the constitution," and entered upon the performance of the duties pertaining to the office of sheriff of Randolph, and since the 18th of March, both Caskey and Carpenter have acted as such; the latter executed the writ in this case. The plaintiff objected to the trial of the question raised upon these facts, and insisted, that if available, they should be brought to the view of the Court by plea in abatement.

W. P. Chilton and F. W. Bowdon, for the plaintiff contended, that the service of the writ was made by one who was sheriff *de facto*, and was quite as effectual to bring the defendant before the Court, as if Carpenter had been an officer *de jure*. If, however, the service was invalid, it should not have been quashed on motion; but the defendant should have been put to his plea in abatement.

S. F. Rice, for the defendant, insisted, that the order vacating the service of the writ was not revisable on error. [Maverick v. Duffee, 1 Ala. Rep. N. S. 433; Cotton v. Huey, 4 Id. 57.] The appointment of Carpenter was on a supposition false in fact, and therefore void; but if valid, it continued only up to the time of the next election in August, 1843. [Con. of Ala. Art. 4, § 24.] Although Caskey did not act from June, '43, to March '44, yet when the order of removal was reversed, and he executed a new bond he was reinvested with his office.

COLLIER, C. J.—The constitution invests the Governor with authority to fill any vacancy, which may occur subsequent to an election, in the office of sheriff, and declares that the appointee shall continue in office until the next general election. [Art. 4, § 24; The State ex rel. Murray v. Ayers, Minor's Rep. 323.] In the present case it is conceded, that Carpenter was appointed to the sheriffalty upon the hypothesis, that Caskey had vacated his office; and whether the suggestion and proof upon which the execution acted, was founded in truth, cannot be collaterally drawn in question. In such a proceeding it would, if necessary, be intended, that the state of things contemplated by the constitution existed, and that the appointment was regular—not only in fact, but in law. But conceding that Caskey was wrongfully removed, and was reinstated by the reversal of the order of removal, and the execution of a new official bond, and does it necessarily follow, that the service of process by Carpenter, thereafter, was a nullity.

In Garner v. Clay, et al, 1 Stewart Rep. 182, it was decided, that the acts of a sheriff *de facto* are valid, although there is another person who has been elected to the office, and consequently entitled to it *de jure*. The service of process by the former was considered good as to the public, and between the parties to the suit. So, where a judge was appointed pursuant to a statute, which was afterwards declared void by a judicial decision of the highest Court of the State, the question was raised, whether all the acts of the judge so appointed were void. It was said, that as the judge acted under color of legal authority, &c., his decision, as an officer, *de facto* was valid, though the authority under which he acted was void. [Taylor v. Skinner, 2 So. Caro. Rep. 696.] It is said to be a settled rule of law, that the acts of officers *de facto* are valid, when they concern the public, or the right of third persons who have an interest in the act done; this has been adopted to prevent a failure of justice. A different rule has however been adopted, where the act is for the benefit of the officer, because he shall not take advantage of his own want of title, of which he cannot be ignorant. [Keyser v. McKissan, 2 Rawle's Rep. 139; Parker v. Luffborough, 10 Sergt. & R. Rep. 249; Laurenson v. The State, 7 Har. & Johns. Rep. 339;

McKinstry v. Tanner, 9 Johns. Rep. 145; Johnson v. Wilson, et al, 2 N. Hamp. Rep. 202.]

"An officer *de facto*," says Lord Ellenborough, "is one who has the reputation of being the officer he assumes to be, and yet is not a good officer in point of law." The acts of a steward *de facto*, he concludes, are good, because the suitors cannot examine his title; but when his authority has notoriously ceased, no such reason obtains. And so of the acts of the under steward after the death of his principal, and the fact is known. [The King v. The Corporation of Bedford Level, 6 East's Rep. 369; Baird v. The Bank of Washington, 11 Sergt. & R. Rep. 411: Vestry of St. Luke's Church v. Matthews, 4 Dess. Rep. 578; Vernon Society v. Hills, 6 Cow. Rep. 23; Charitable Association v. Baldwin, 1 Metc. Rep. 359.]

It is said, that a person by color of election may be an officer *de facto*, though indisputably ineligible; or though the office was not vacant, but there was an existing officer *de jure* at the time. [See Ang. & Ames on Cor. 225, and cases there cited.

Let this view of the law suffice to show, that Carpenter was *at least* a sheriff *de facto*, from the time he received the executive appointment until Caskey again resumed his office, and the fact of resumption became so public as to be known to those who might require the sheriff to act in their behalf. Whether, after the existence of such a state of things, Carpenter could be regarded as a sheriff in fact, is a question which the present case does not require us to determine. He executed the writ on one of the defendants six days before, and on the other twelve days after Caskey was reinstated; this service we think was sufficient, and that the Circuit Court should not have set it aside. Having attained this conclusion, we need not inquire whether, if it had been insufficient, the defendants could have availed themselves of the objection on motion. In Bondurant, et al. v. Buford, 1 Ala. Rep. 359, we said, that whenever an individual has been sheriff for three years, (the time limited by the constitution,) and a successor has been elected, who has taken the oaths, executed the bond required, and is admitted to the discharge of his official duties, the old sheriff cannot be regarded as an officer in fact, or law. This remark was made in reference to the facts of the case

then before us, but we do not say that the acts of the old sheriff would, under such circumstances, be in all cases void. Besides, the remark was a mere *dictum*, and if indefensible, we should not feel bound by it.

The consequence is, that the judgment of the Circuit Court is reversed, and the cause remanded.

DUNLAP v. CLEMENTS, ET AL.

1. An injunction may be dissolved upon the answer of those defendants within whose knowledge the facts charged in the bill must be, if they exist at all, although there are other defendants who have not answered.
2. When all the indorsers on a bill have indorsed it for the accommodation of the acceptor, and he executes a deed of trust for the indemnity of the two last indorsers, the first indorser is not entitled to enjoin the collection of the bill against them on the ground that they refuse to sell the trust property and apply it to the bill. He can only be subrogated upon paying the bill.

Appeal from a decretal order of the Court of Chancery for the 22d District.

The case made by the bill is this. About the 1st of February, 1842, Dunlap became the first indorser of a bill of exchange drawn and accepted by one Lee; Battle and Foster became subsequent indorsers on the same bill, which afterwards was negotiated to Clements, and being protested for non-payment, was put in suit by him, and jndgment thereon recovered in his name. That Battle and Foster, procured Lee to execute a deed in trust, conveying a tract of land, and two slaves, to one Donoho, in trust, to secure them against loss on their said indorsements, and providing that Lee should remain in possession until default of the bill, in which event the trustee was, upon request of Battle and Foster, to take the property and sell it, up-

on giving twenty days notice. Battle and Foster permitted Lee to remain in possession a considerable time after the bill was protested, whereby Dunlap was induced to suppose he never would be called on to pay it. That the property conveyed by Lee, is amply sufficient, if well managed, to pay the amount due upon the bill, but Battle and Foster have refused the application of Dunlap to produce and sell it for that purpose. Battle and Foster either paid the amount of the judgment obtained on the bill, to Clements, or have made some arrangement with him, by which they have become the owners of the judgment against Dunlap, and are endeavoring to coerce payment by execution. Clements, Battle, Foster and Donoho are made defendants to the bill, which prays that the trust property may be produced, and the same also ordered to be sold, and the proceeds applied to the satisfaction of the judgment against Dunlap. An injunction was also prayed for to restrain the collection of the judgment. This was granted.

Battle, Foster and Donoho, answered the bill; Donoho asserting his ignorance of the transaction, but conceding the existence of the judgment on the bill, and the deed of trust, and presumes he was named trustee, at the nomination of Battle and Foster.

Battle and Foster admit the making and indorsing of the bill of exchange, but deny that Dunlap is entitled to be considered as an accommodation indorser, as the bill was in renewal of one previously due from Dunlap & Lee, who had been partners. Battle and Foster were indorsers for Dunlap & Lee, and refused to indorse the bill for Lee, unless Dunlap's name preceded their own. Dunlap & Lee had dissolved their connection previously to the making of the bill, and by some arrangement between them, Lee was bound to take up the one then outstanding.

After the making and indorsing of the bill, fearing they were not as safe from danger of loss as they considered themselves when they indorsed it, Battle and Foster procured Lee to execute the deed of trust for their indemnity. Lee, after the maturity of the bill, absconded, taking with him the slaves conveyed by it. They admit the purchase from Clements of the judgment against Dunlap, and that the whole of the property conveyed by Lee, would be sufficient to pay the amount due

on the bill; but they deny being guilty of bad faith in the management of it, as they never had the idea that Lee would attempt to run the slaves, and did not suppose it to be their duty to sell the trust property as soon as default was made. They deny that Dunlap applied to them or to the trustee, to have the property produced and sold, and the proceeds applied to the satisfaction of the judgment against him, but assert, that after the maturity of the bill, Foster offered to Dunlap, if he would pay it, and relieve them from liability, they would transfer to him the benefit of the deed of trust; this they aver, they are still, ready to do, upon his paying the amount of the bill, interest, damages and costs. They assert the value of the land is only $500, and pray their answer may be taken as a demurrer to the bill.

The Chancellor, on the coming in of these answers, dissolved the injunction.

The complainant appealed from the order, and now assigns as error—

1. That all the defendants had not answered.

2. That the case made by the bill and answers, is sufficient to retain the injunction.

Porter, for plaintiff in error.

Peck & Clark, contra.

GOLDTHWAITE, J.—1. Clements, in this case, is a mere formal party to the bill, if its allegations are true; but the facts upon which its equity is supposed to arise, must be in the knowledge of the other defendants, if they exist at all, and, therefore, when this equity is denied or avoided by their answer, the rule is, that the injunction may be dissolved, although the other party has not answered. [Long v. Brown, 4 Ala. Rep. 622; Depeyster v. Graves, 2 John. Chan. 148.]

2. The equity arising out of the facts stated in the bill, did not, in our judgment, warrant the injunction in the first instance. In order to see this clearly, it is only necessary to determine the relation of the several parties to Lee, the principal debtor and between themselves. Each of the indorsers was an independent surety for Lee, and all of them are bound to each other in the order their names appear on the bill, and there is

no contribution between them. [Brahan v. Atwood, 3 Stew. 247.] Each of them, upon paying the bill, will become the creditor of Lee, and of those whose names are before his own upon it. Now as between a debtor and creditor, where the latter, in addition to the formal obligation of his debtor, has also a security to which he may resort for payment, there is no ground upon which the creditor can be compelled to resort to that security before he asserts his claim by a personal suit against his debtor. [Wright v. Simpson, 6 Vesey, 713; 1 Story's Equity, § 640.] Conceding that Battle and Foster have paid Clements the amount of the bill, they are entitled, as the creditors of Dunlap, to sue him upon it, or they may, with the consent of Clements, enforce his judgment for their benefit. [Chitty on Bills, 661.]

It may be, that where a creditor has acted in such bad faith to a surety of his debtor, that the original security placed in his hands, by the act of bad faith, is lost, that equity will relieve; but that is not this case, as the prayer is, that the subsequent indorsers may produce the property assigned by the principal debtor for their indemnity.

If Dunlap has any right to be substituted to the indemnity which Lee executed for the benefit of Battle and Foster, it is to be derived from the equitable rule by which Clements, as the original creditor, could compel them to use it for his benefit. That he could do so seems clear, from adjudged cases. [Wright v. Mosley, 11 Vesey, 22; 1 Story's Equity, § 638.] Any security which Clements may resort to, he may be compelled to use for the benefit of any one standing to Lee in the place of a surety. [Craythorn v. Swinburn, 14 Vesey, 159; 1 Story Eq. 499, and cases there cited.]

Conceding then, that Dunlap, upon paying this debt, may, in equity, require Battle and Foster to assign to him the benefit of the deed of trust, or to enforce it for him, yet there is no reason shown upon the bill why they should be delayed of their personal remedy.

The result of this reasoning is, that the injunction should not have been awarded in the first instance, and therefore it was properly dissolved.

It will be seen that we have said nothing in relation to Dunlap's equities, as against Battle and Foster, in the event that

the security given to them by Lee is lost, by their bad faith or mismanagement. The reason is, that no such case is made by the bill, as that proceeds entirely upon the supposed right of Dunlap to have that security executed before the suit can be enforced against him. This view, we have shown, cannot be sustained. Decree affirmed.

COLLIER, C. J., not sitting.

ESLAVA v. DOE, EX DEM. THE HEIRS OF FARMER.

1. The effect, and design, of the various acts of Congress, confirming incomplete titles to land, in Florida, it would seem was not to legislate upon the title, but by the disavowal of title in the United States, to remove all obstacles to the settlement of controversies relating to the title by the judicial tribunals. But, where Congress, confirms the title, to the same land, to two individuals, the confirmation is merely a disavowal by the United States in favor of both parties, of all right, and title, to the land in dispute. Each, therefore, must rely on the strength of his own title, and although in such a case, a patent may issue, it adds nothing to the title derived from the United States, which was complete, so far as it depended on the United States for its validity, by the act of confirmation.
2. Where the United States relinquishes title to land to the "heirs" of a British subject, it must be understood that the term *heirs* is used in reference to our laws, and not to the English law of promigeniture.

Appeal from the Circuit Court of Mobile.

EJECTMENT by the defendants against the plaintiff in error.

The plaintiff to sustain his case, offered in evidence, a patent from the United States, by which it "*released, remised, and forever quit claimed to the heirs of Robert Farmer, and their heirs,*" (for the *locus in quo,*) "subject to any just claim, or claims, to all and every part thereof, all and every person, or persons, bodies politic, or corporate, derived from the United States, or from either the British, French or Spanish authorities." The patent issued on the 14th November, 1837, and in

the recital is stated to be issued, under the provisions of the act of Congress of the 8th May, 1822, confirming claims to lands in the town of Mobile, &c.; and proved that the land sued for, was within the limits of the patent, and the defendant admitted he was in possession. To establish the heirship of the lessors of the plaintiff, he read the depositions of Mrs. Fisher, Mrs. Beaumont, and Mrs. Chastaing. To the introduction of the latter, the defendant objected, because the notice was given before the commission was allowed, and because it did not prescribe the notice. The objection was overruled, and the defendant excepted. The plaintiff also read the deposition of B. Magoffin, together with sundry records from the land office, which need not be here inserted.

The defendant to support the issue on his part, read from the book of translated records, certain documents described in the opinion of the Court, though objected to by the plaintiff: also, a paper executed by Joaquim de Osorno, civil and military commandant, of Mobile, to Miguel Eslava, on the 30th of June, 1802, by which he conveys to him, the house wherein he dwelt, for the consideration of two thousand dollars, and proved that Miguel Eslava was dead, and that the defendant was his heir; which was objected to by the plaintiff, because Osorno was commandant at the time the conveyance purported to be made, and because it only conveyed a house, and not land; but the Court overruled the objection and permitted it to be read. The defendant also read other papers from the land office, described in the opinion of the Court.

It was also in proof that Osorno built the house in 1801 or 1802, which continued upon it until some time after 1820. That Fontanella inclosed it, and offered to sell it to witness. Witnesses were introduced to prove that the lot was occupied by the Spanish commandants, who told the witnesses they paid rent to Eslava; and that since the 15th of April, 1815, Eslava rented the property to the American officer in command at Mobile, and afterwards to a Masonic Lodge, and received rent. It was also in proof, that one De Vobiscey, the son-in-law of Farmer, interrupted the possession of Eslava in 1817, '18, or '19, and that proceedings for an unlawful detainer commenced in 1819—that De Vobiscey entered peaceably, claiming title, and representing the heirs of Farmer. That

the proceedings resulted favorably to Eslava before the justice of the peace, who was placed in possession—that, subsequently, the proceedings were reversed, and De Vobiscey restored—that the heirs of Eslava on the day of the execution of the writ of restitution, commenced an action of trespass, to try title, and recovered the same with damage for the detention. See the cases of Hallett v. Eslava, 2 Stewart, 115, and Hallett v. The heirs of Eslava, 3 Stew't & Por. 105; since which time the defendant has been in possession.

It was further in evidence, that Thomas L. Hallett took under the writ of restitution, and held the same under conveyance from De Vobiscey, and wife in fee, for one-fifth part, and a mortgage for the residue. It was in evidence, that until De Vobiscey made his claim there had been no assertion of title by the heirs of Farmer since 1782—that none of the family of Farmer remained in the Spanish Province of West Florida, and that it was the general reputation in the Spanish times, from about the date of the conveyance to Eslava, that the land belonged to him. There was much evidence offered by the plaintiff to contradict the location of the lot in defendant's possession.

The Court charged the jury, that the patent from the General Government to the heirs of Robert Farmer, conveyed to them such title as the Government of the United States had in the land, either legal or equitable, at the time of its date, and no more. That the law presumed the title to be in the Government, and by virtue of the patent alone the patentee could enter, unless it was shown by the defendant, that at the date of the patent the legal title to the land was not in the United States.

That the evidence of title introduced by Eslava, showed that the legal title to the land claimed by him, was in the Spanish Government, until the territory was ceded by France to the United States—that the cession of the territory by France, conveyed to the United States the legal title to the lands sued for—and although the equitable title to the land claimed by Eslava, might be in him yet the evidence introduced by him, showed an equitable title only—that the patent conveyed the legal title to the heirs of Farmer, and that it must prevail over the equitable title.

That although Robert Farmer might have been an alien, and his children or heirs at law aliens, that they took the legal title, notwithstanding their alienage, and could recover, though the equitable title was in another. That in ascertaining who were the heirs at law of Farmer, reference must be had to the laws of this country, and not to the laws of England, or of any other country; and the persons intended by the word "heirs" in the patent, are such persons as would have been denominated and entitled to the character of heirs of Robert Farmer, if he and his children had been citizens of the United States; and that the legal title vested in his children or grand children, if any there were.

That the mortgage deed to Hallett, did not estop them, from asserting their title, as the defendant did not in any way connect himself with it, nor show that it had not been fully discharged.

The defendant then moved the Court to charge, that if Miguel Eslava, and those from whom he claimed, had been before suit brought, in continued and undisturbed possession for thirty years, under the Spanish act of 1788, and the mesne conveyances shown in evidence, then the plaintiff cannot recover. That all the evidence of declarations made of pedigree, after 1820, be excluded from the jury, if they shall believe that a suit was commenced for forcible entry and detainer, previous to the making of the same. That if Thomas R. Hallett was in possession of the lot as owner of one undivided fifth, and of the whole as mortgagee of the plaintiff, and that in an action of trespass to try titles, the defendant, and those from whom he claims, recovered from Hallett, the plaintiff cannot recover. That if the jury believe the deed shown in evidence by the defendant, and certificate of affirmation, be authentic, and possession accompanied the same in the several parties thereto, they must find for defendant. That if the defendant, and those from whom he claims, have been in the possession of the lot for thirty years before suit brought under the act of title exhibited by him, without disturbance or interruption, the plaintiff cannot recover. That if the defendant had possession of the land for twenty years without disturbance prior to 1820, under the acts of title in evidence, and since 1833 under the judgment in evidence, as well as the acts of title, and deeds

shown in evidence, then the plaintiff cannot recover. That if the defendant and those from whom he claims, have been in possession since 1788, with the exception of eight years, during which a trespass from one T. R. Hallett existed, he claiming under the plaintiff, and that the defendant recovered the same from him as a trespasser, the jury can presume a complete grant, or any other act necessary to sustain that title. These charges the Court refused to give, and the defendant excepted as well as to the charges given.

The defendant assigns for error the several matters set forth in the bill of exceptions.

Campbell and Stewart, for plaintiff in error. The titles of the parties, are as follows: The defendant in error relies alone upon the patent which issued in 1837, and upon the proof to show that the lessors of the plaintiff below, are the heirs of Robert Farmer.

In 1782, Robert Farmer was a British subject—if a native of the United States, he had adhered to the British Crown, and the place of his domicil, was a British Colony, and the common law rule of descent must prevail, in the absence of any statute abrogating it. The proof then is insufficient, as it does not show that the sons of Farmer died unmarried, and without issue, and that they were capable of transmitting an estate of inheritance, to the lessors of the plaintiff.

The defendants title consists of—1. The treaty between Spain and Great Britain, by which West Florida was ceded to Spain in 1783. [2 White's Recap. 292, 305.]

2. A Spanish concession to Elizabeth Fonnerette in 1788.

3. A conveyance from her to Fontanella in 1798.

4. One from him to Osorno in 1801.

5. And from him to M. Eslava in 1802.

6. Possession by Eslava till his death with an interruption hereafter to be considered.

7. Death of M. Eslava, and descent to defendant.

8. Confirmation of those lands by the act of 1822.

The first objection is, that Mrs. Fonnerette's application is vague—she applies for the lot of Mrs. Farmer. The boundaries given by Mrs. F. in her deed to Fontanella, are the same that are found in his deed to Osorno. The admeasurements vary,

but the fixed boundaries remain, and the rule is well established that course, and distance, are controlled by definite boundaries. [1 Troplong, 488; 7 Cowen, 723, 61; Id. 273; Greenleaf's Ev. 49, 50, 51.]

The second objection is, to the term "house," in the deed from Osorno, which it is supposed, is insufficient to convey land, but the law is clearly otherwise. The rule is that the accessory follows the principal. [Bishop Taylor's Works, book 3, chap. 4; 4 Com. Dig. 542; 2 D. & E. 498; 21 Pick. 25.]

The defendant's title is claimed to be superior upon the following grounds:

1. That from the recitals in the deeds before the commandant—the sales witnessed by that officer—long continued possession—the Government confirmation of the specific title, as a title founded upon a grant lost by time and accident, a grant will be presumed. [Greenl. Ev. 50; 9 Peters, 760; 12 Id. 452; 16 Id. 55.]

2. That the Spanish acts, and the conveyances before the commandants, connected with the terms on which Spain delivered the province of Louisiana to France, and the terms by which that power conveyed it to the United States, amount to a completion of the title. [White's Recap. 718; White's Spanish Laws, 162; 14 Peters, 413.]

3. That the act of the United States recognizing and confirming the title, establishes its legal character, and enables the Court to assert its validity, against conflicting titles in the same manner as if it had been perfected by France or Spain.

4. That the true theory of these titles is, that if they afforded a claim upon the conscience of the crown of Spain for completion at the date of the cession of the territory to France, and France received the territory on the terms, that they should be completed, that this obligation was transferred to the United States, and is a legal obligation to be enforced by Courts of justice. That the true rule of decision is, the validity of the claim, according to the laws and usages of Spain. That the government, as a general rule, has never attempted to settle conflicting rights, but has contented itself with a general acknowledgment of the right, and a reference of the party to courts of justice. The confirmation simply amounts to a relinquishment of all claim—it is not a release to the party.

The effect is, to open the Courts, which determine the conflicting rights. The case in 9 Peters, 225, strongly illustrates this view, as it acknowledges the supremacy of the State tribunals, and denies the pretensions set up for the United States of controlling the subject. [See Judge Baldwin's opinion, 14 Peters, 413; 11 Martin, 207; 12 Peters, 446; 3 S. & P. 184, 106; 4 Louis. R. 410, 43.]

The patent of Farmer's heirs is evidence—1. That the government acknowledges a claim in them superior to its own. 2. That the title is good against the United States, and any one claiming under it, by subsequent recognition. 3. That this acknowledgment is not to be used to the prejudice of any other existing claim.

On the other hand, the papers presented by the defendant show—1. That he claims against the United States, by a title supposed to be good, but the evidence of which had been lost. 2. That the government acknowledges this claim, and confesses that the land was appropriated by Spain, and therefore not ceded by France to the United States. At this point the action of the Federal Government stops, and there being a conflict about the title, it forms a case for the judicial tribunals. [7 Peters, 51; 8 Id. 436; 9 Id. 117, 133, 147; Strother v. Lucas, 12 Peters, 410.]

The claim of the heirs of Farmer it is confessed, afforded no argument for a claim against the government, whilst the claim of the defendant on the government is supported by a legal act of a government, *de jure*, and *de facto*. The sales under which he held passed before the commandant, and is upheld by a long and peaceable possession. This, then, is a right protected by the treaty, and for the enforcement of which Courts are established. [4 Peters, 511; 9 Id. 225; 10 Id. 737; 14 Id. 415.]

A most important means of acquiring property is by *prescription*. It is the foundation of all titles, and no civilized nation has ever existed in which it has not been recognized. [2 Touillier, 337; 1 Troplong, Pres. 14, 15; 24 Merlin, 132.] The acknowledgment by the United States, of the defendant's claim, shows that it was one which might depend on prescription for its validity. 1 Ala. Rep. N. S. 660, 76, is expressly in point. See, also, 2 Troplong, 393-4; 1 Wheaton, 292; 12 Wend. 674.

The interruption, by De Vobiscey, did not destroy the claim by prescription, as he entered without right, and a title without foundation, will not support a prescription. [2 Troplong, 394, 420; 12 Johns. 365; 9 Wend. 511; 20 Id. 261; 1 Cowen, 286; 5 Peters, 151.]

The recovery by the heirs of Eslava, removed the effects of the interruption. The only American case, that discusses this question, is found in 15 Louisiana, 566, where the argument of Troplong is adopted. See also, 8 Cranch, 462. The law upon the statute of limitations, or prescription in England, is meagre. [15 Viner, 46–7.]

The effect of the confirmation in the Royal Order of the King of Spain, dated Barcelona, 5th October, 1802, White's Spanish Laws, 162, is discussed in 14 Peters, 413. For the value of the acts of sales before the Spanish officers, see White's Recap. 719–20.

Phillips, contra. The title of Farmer's heirs is derived from the United States; the report—the act of Congress, and the patent. Who were the heirs of Robert Farmer, must therefore be resolved by the *lex loci rei sitae* at the time the title was conferred upon them.

It is admitted that the claim of Farmer's heirs had lost its validity, by the terms of the treaty, and that the patent they now hold is a donation from the Government, on account of the peculiar circumstances of the case.

As to the title of the plaintiff in error. The concession to Mrs. Fonnerette did not sever the premises from the Spanish Domain, and the title continued in the King, until it was transferred to this Government, it being an imperfect, or inchoate title only. [3 Louisiana R. 47, 107; 4 Id. 443; 3 Id. N. S. 35.] That this title was not valid under the Spanish Government, is shown by the Order of Morales, issued under the authority of the King of Spain, on the 17th July, 1799, (Land Laws, 984, § 18,) where it is declared, that although a survey may have taken place, and they have been put in possession, they cannot be regarded as the owners of the land, until their real titles are delivered complete, with all the formalities there recited. But in this case, no survey was ever made.

The lot of ground granted to Mrs. Fonnerette, is sixty feet

front, she sells the same quantity to Fontanella; this therefore, is certain, while the calls for boundaries are uncertain, and the defendant therefore cannot claim more.

It is admitted, that a grant of a house, would convey the land, because this is the legal presumption; but a bill of sale by a Spanish Commandant, who had no authority to deal in real estate, selling his house, which he built with his own money, upon the lot purchased from Fontanella, repels the idea upon its very face, that land was intended to be conveyed.

As the title of the heirs of Farmer was derived from the patent, their right of entry did not exist until then; they cannot, therefore, be barred by a previous adverse possession. [4 Bibb, 544; 2 Id. 413; 7 Ohio, 252; 5 Litt. 318; 7 Wendell, 127; 6 Peters, 673; 12 Wheaton, 601; 1 Marshall, 59, 506; 8 Cowen, 603.]

A grant by the Government will pass its title, notwithstanding adverse possession. [6 Pickering, 409; 4 Mass. 528; 4 Bibb, 454; 7 Wend. 125; 8 Cowen, 589.]

Possession will not be protected under the statute of limitations, when one of the links to the chain of title is wanting. [9 Wheaton, 541; 7 Mass. 783; 9 Johns. 270; 13 Id. 552; 20 Id. 301.] Must be hostile in its inception, marked by definite boundaries, an actual occupancy, positive, notorious, uninterrupted. [1 Johns. 156; 2 Bibb, 507; 1 Marshall, 62.]

Prescription does not exist by the law of England, but in relation to incorporeal hereditaments. [Coke Litt. 113, B. 2; Black. Com. 263; 1 Phil. 316.] There is a negative prescription as to corporeal hereditaments, from the statute of limitation, by extinguishing the remedy. [1 Blk. Rep. 675; 1 Lomax, 616; 2 Johns. Rep. 362.] So a possession of twenty years will be sufficient to maintain an action, against a trespasser without color of title. [5 Litt. 319; Ad. on Eject. 29.]

Presumptions of grants, are founded upon the consideration, that the facts are such, as according to the course of human events, could not occur, unless there was a transmutation of the title. Such presumptions are never made where, as in this case, the claim is of such a nature, that a grant could not exist. [7 Wheaton, 110; 2 Bibb, 426; 4 Pick. 246; 2 Wm. Black. 1228.]

In ejectment, the elder legal title must prevail. An elder equitable title, cannot be given in evidence. [2 Bibb, 129; 4 Id. 416; 3 Litt. 37; 5 Id. 321; 3 Marsh, 255; 2 Johns. 221.]

Until the patent issues, the title remains in the government, and although a state may authorize an action of ejectment on a certificate, it has no power to declare any title less than a patent, valid against the Government, or its grantee. [13 Peters, 436, 98; 8 Louis. R. N. S. 490; 3 Id. 397; 1 Louis. R. 56; 4 Id. 272.]

Defendant claiming title from the same source, as plaintiff, cannot set up an out standing title. [5 Cowan, 530; 9 S. & R. 47; 2 Bibb, 507.]

The United States had a perfect right to investigate these claims, and to recognize, or reject, imperfect titles derived from the foreign Government, and to prescribe the mode of establishing them on condition of forfeiture, and hence the various acts of Congress subjecting the claims to certain restrictions, have been supported as valid. [3 S. & P. 122; 6 Peters, 771; 12 Id. 448; 12 Wheaton, 599.]

In relation to these imperfect titles, which affected only the conscience of the King of Spain, where the government has not instituted a tribunal, as in Missouri, and Florida, in which it may be said, its action over them is final, and cannot be reviewed in the State Courts. The case cited to support the opposite view from 9th Peters, 224, was the case of a perfect title, in the city of New Orleans by dedication, and therefore, did not include this question.

The entry of De Vobiscey, claiming title, interrupted the possession of defendant. [11 Peters, 52.]

ORMOND, J.—The counsel for the defendant in error, admits, that the title of the heirs of Farmer, rests entirely upon the patent offered by them in evidence for the land in dispute, which issued on the 14th November, 1837. It recites, that it is issued in virtue of the provisions of the act of Congress of the 8th May, 1822, pursuant to a favorable report, made by the commissioners, appointed by the United States, in consideration whereof the United States released, quit claimed, &c., "subject to any just claim, or claims, to all, and every part thereof, all and every person, bodies politic, or corporate, deri-

ved from the United States, British, French, or Spanish authorities, to have and to hold," &c. It is in its essence a mere quit claim deed, and if the United States had nothing in the subjeet to grant, nothing passed by it.

The title of the defendant, is derived from a concession by the Spanish authorities in 1798, and he connects himself by several mesne conveyances, from the grantee to himself, and shows a continued possession of the lot, with the exception of a disturbance not necessary now to be noticed, from that time to the present. This claim was presented to the commissioner appointed by the United States, reported favorably on by him, and his report confirmed by the act of Congress of 8th May, 1822.

The argument of the counsel for the defendants in error, is, that as both parties derive their title from the United States, and as their patent is evidence that the legal title is in them, they must prevail in this action; and to this effect the Court below charged the jury.

The land in controversy, lies within the territory which, according to the uniform assertion of the United States, in every department of the Government, was acquired by the treaty of Paris in 1803. It is, however, as it regards this question, quite unimportant, whether the title of the United States rests upon the cession made by the treaty of Paris, or by that made with Spain, in 1819, by which the Floridas were acquired; as in both, this Government came under the same obligations to respect the rights of private property. Such would have been the law, if the treaty had contained no such provisions, or if the country had been acquired by conquest. [Perchieman's case, 7 Peters, 51; Strother v. Lucas, 12 Peters, 438, and Innerrarity v. Byrne, 1 Ala. Rep. 672.]

By the 3d article of the treaty of Paris, the inhabitants of the ceded territory, were to be "protected in the free enjoyment of their liberty, property, and the religion which they profess." What was meant by the term, "property," in the treaty, has been frequently under consideration in the Supreme Court of the United States. In Soulard's case, the Court held, that this term in the treaty, "as applied to lands, comprehended every species of title, inchoate, or complete. It is supposed to embrace those rights, which lie in contract; those which

are executory, as well as those which are executed. In this respect the relation of the inhabitants to their government is not changed. The new government takes the place of that which has passed away." To the same effect are, Smith v. The United States, 10 Peters, 326, and Strother v. Lucas, 12 Id. 440. The new sovereign, is merely substituted for the former, and is affected by the same considerations, which would operate on the conscience of the latter, to complete all titles which are inchoate, or informal.

The United States has, with the most perfect good faith, performed this stipulation, and has confirmed all titles emanating from the former proprietors of the country, having the semblance of justice. To ascertain what claims existed in favor of private individuals to land within the ceded territory, and to separate those claims from the public domain, was the obvious design of the different boards of commissioners, which have at different times been established, (7 Peters, 89,) and when so ascertained, have been recognized as private property, and confirmed by a public law.

What is the effect in law of this confirmation? The act of 8th May, 1822, by which the claim of the defendant was confirmed, declares, that the confirmation "shall amount only to a relinquishment forever, on the part of the United States, of all right, and title whatever, to the lots of land so confirmed." This is nothing more than an admission by the government, that the land so confirmed, is private property, and is not a part of the public domain. It is not, and was not intended, to be a guaranty of the validity of the title so confirmed, except as against the government. It does not, and was not intended to confer, on the confirmee, any right as against other claimants to the same land, as is conclusively shown by the facts of this case—the government having confirmed the titles, both of the plaintiff, and defendant, to the same land.

It is then merely an admission by the government, that the land is private property, and cannot be considered as an adjudication by the commissioners, or Congress, of the claim so confirmed, as against other individuals, claiming title to the same lands. The confirmation is merely a disavowal by the United States, in favor of both the parties, of all right and title to the land in dispute; each, therefore, must rely on the

strength of his own title, and in the contest with his adversary, neither can derive any aid from the fact, that the United States sets up no title to the land, which, in this case, is the whole effect of the confirmation, made in favor of both parties.

This controversy, has been previously before this Court. At the January term, 1833, it was here by the name of Hallett v. Eslava, 3 S. & P. 105—Hallett relying on the title of the heirs of Farmer. At that time, each party produced in evidence a confirmation from the United States, to the land in dispute, and also a patent certificate from the register of the land office, and each endeavored to fortify the title derived from the confirmation, by producing the evidence of title on which the favorable report of the commissioner, and the act of Congress confirming his report, were based. The Court determined, that the confirmations balanced each other, and that the title produced by Eslava, independent of the confirmation, was superior to that of his adversary. The only difference between the case as now presented, and the question then before the Court, is, that the heirs of Farmer, have since then, procured a patent to be issued from the general land office, upon their patent certificate, and now rely upon that alone. In this state of the case, the Court below held, that the patent conveyed the legal title, and that the confirmation, and patent certificate of the defendant, was evidence of an equitable title only, and therefore, in a Court of law must yield to the former.

The terms, legal, and equitable, when applied to these incomplete Spanish titles, do not convey to the mind any very definite idea. If there be a valid title to land, derived from the former Government, and the United States does not assert any title to the land, by virtue of the cession, it is very unimportant what its particular form or designation is, or what would be its specific character, if it had originated under our laws. It is sufficient as against all others, that it is a valid subsisting title. In the case of Innerrarity v. The heirs of Mims, 1 Ala. Rep. 600, this Court held, that a possession commenced under the Spanish Government, and continued under ours a sufficient length of time to bar entry, was a valid title.

The charge of the Court not only asserts, that, in the case of

these incomplete titles, the legal title was vested in the United States by the treaty, charged with the obligation to convey the fee to the true owner—but it also assumes, that the confirmation of such title still leaves the fee in the United States, which can only be divested by obtaining a patent.

We are not aware, that this question has ever been expressly decided by the Supreme Court of the United States, though numerous passages might be cited, which incidentally bear upon it. Indeed, it is extremely difficult to say, what is the law of that Court upon these treaties. In Strother v. Lucas, 12 Peters, at page 454, it would seem, from the opinion delivered on behalf of the majority of the Court, that a confirmation, such as this, was a statute grant, operating as a conveyance to the grantee; but whether that was a point necessary to be decided in the determination of the cause, and acquiesced in by the majority, appears to be doubtful.

It cannot, we apprehend be questioned, that in the case of these incomplete titles, derived from the former proprietors of the country, the United States stands in relation to those claiming such title, precisely as the former governments would have stood, if there had been no cession of the soil. Such being the case, an admission by this Government, to one claiming title from the former proprietor, that the land is not part of the public domain, and that it acquired no title to it by the cession, must have the same effect, as if such a declaration had been made, by the former proprietor before the cession; which would certainly have divested the title of the sovereign, leaving the party claiming the land, at liberty to assert whatever title he could establish. Such, it appears to us, must be, and was intended to be, the effect of the confirmation in cases like the present. It was not, and does not purport to be, a donation from the Government. Doubtless, in the latter case, the title remains in the Government, notwithstanding the inceptive act may be performed by the donee, until the patent issues. Such was the case in Bagnel v. Broderick, 13 Peters, 436, where a subsequent fraudulent patentee, was held to have a superior legal title, to one claiming by virtue of a prior location, under a New Madrid certificate.

It was however, strenuously argued, that the United States had the right to impose such conditions, as it pleased, and that

the grantee, can only take upon the performance of the condition. So far as this argument supposes, that this Government could assert any right to land, held under a title derived from the former Government of the country, merely because the title was incomplete, it is certainly untenable. But conceding, that this Government had the right to stipulate as the condition on which its disavowal of title was made, of the mode by which the title of the claimant should be evidenced, what are the terms employed by it. The act of 1822, 1 vol. Land Laws, 348, under which plaintiff claims, is as follows:

The first section confirms all claims contained in the report of the commissioners, founded on complete grants, which are recognized "as valid."

The second section relates to claims established by written evidence, bearing date prior to the 20th December, 1803, which are "confirmed in the same manner as if the title had been completed."

The third section is, "That all the claims to lots, in the town aforesaid, reported as aforesaid, and contained in the reports of the commissioners, &c., founded on private conveyances, which have passed through the office of the commandant, or other evidence, but founded, as the claimants alledge, on grants lost by time and accident, and which ought, in the opinion of the commissioners, to be confirmed, shall be confirmed, in the same manner as if the titles were in existence: *Provided*, that in all such claims, where the quantity claimed is not ascertained, no one claim shall be confirmed for a quantity exceeding seven thousand two hundred square feet." See, also, 3 vol. State Papers, page 32, where the report of William Crawford, the commissioner to which this section refers, will be found. To this class, we understand the claim of the plaintiff in error belongs, and it appears to us very clear, that nothing further was contemplated, to the complete investiture of the title. The language of the act is, that the claim is "confirmed in the same manner as if the title were in existence." If a complete grant, from one of the former governments existed, certainly no patent would be necessary from this; and where is the difference between the production of a grant, and the acknowledgment by the government that one formerly existed, and is now lost. If further confirmation of this view of the statute were

wanting, it will be found in the succeeding section, which provides for the class of *occupants* where no presumption of a previous grant could arise, there "the claimant shall be entitled to grants therefor as donations."

The fifth section confers on the registers and receivers at St. Helena and Jackson Court Houses, power to direct the manner in which the lots confirmed by the act, shall be located, and surveyed, and refers for the extent of their powers, to an act passed on the same day, which will be found at page 352 of the first vol. Land Laws. The fourth section of that act defines the power of the register and receiver, in relation to the mode of locating and surveying all claims to land, which were not founded on complete grants.

The fifth section declares that "patents shall be granted for all lands confirmed by virtue of the provisions of this act, in the same manner as patents are granted for lands confirmed under former acts, to which this is a supplement." Upon reference to the act for adjusting the claims to land, &c., east of the island of New Orleans, passed 3d March, 1819, 1st Land Laws, 316, by the twelfth section, it appears, that the register was required to issue his certificate for claims confirmed by the act, as well as for donations, and pre-emptions to settlers, and that when properly issued, "a patent should be granted in like manner as for other lands of the United States."

It is evident, from this collation of the laws of Congress, on this intricate subject, that a patent may issue, in all cases of confirmed claims to land, east of the island of New Orleans, upon the presentation of the certificate of the register; but we cannot agree that it is made a condition upon which the title is to be divested out of the United States. The act of confirmation does not only assume, but in fact admits, that the title was not in the United States, by the cession, as it admits that the land in question was separated from the public domain, before the treaty was made. The patent, therefore, when it issued would not convey the title, except as against the United States, it would therefore accomplish nothing more than was effected by the act of confirmation. And, in point of fact, the patent, when issued, merely conveys the right of the United States, reserving the right of all other persons.

In the city of New Orleans v. Armas and Cuculla, 9 Peters,

224, the controversy, as here, was in the State Court, the defendant in the Supreme Court claiming title under a special concession, which was reported favorably upon by the United States commissioner, confirmed by an act of Congress, and a patent issued therefor. The city claimed the property as part of the quay, by a dedication from the King of France. The Court say, "The controversy in the State Court was between the two titles; the one originating under the French, the other under the Spanish government. It is true, the successful party had obtained a patent from the United States, acknowledging the validity of his previous incomplete title from the King of Spain; but this patent did not profess to destroy any previous existing title, nor could it so operate, nor was it understood so to operate by the State Court. It appears from the petition filed in the District Court, that the patent was issued in pursuance to the act of the 11th of May, 1820, 'entitled an act supplementary to the several acts for the adjustment of land claims in the State of Louisiana.' That act confirms the titles to which it applies, 'against any claim on the part of the United States.' The title of the city of New Orleans, would not be affected by this confirmation. But independent of this act, it is a principle applicable to every grant, that it cannot affect pre-existing titles. The U. S. v. Arredondo, 6 Peters, 738."

Language cannot well be more explicit than this, to show that the patent which issues upon a confirmed claim, does not affect a title which may exist to the same land, in another person, or oppose any obstacle to its assertion. The counsel for the defendant in error, aware of this, insists that in the case cited, the opposing title was a complete title, and does not apply to a case where the antagonist title is incomplete. But the question is not, which of two titles emanating from the same source, is superior in the estimation of a court of law, as in that case the legal title must prevail; it is, whether a title emanating from the United States, can operate on, or in any manner affect, a title in another person, previously derived from a source authorized to transfer the title, merely because it is inferior in dignity to that derived from the United States. In truth, however, the United States has never asserted title to the land in dispute, and the whole effect and design of the various acts of confirmation of incomplete titles, would seem to be not

to legislate upon the titles, but by the disavowal of all title, to remove all obstacles to the settlement of controversies relating to them in the Courts of the country.

In this State, by statute, the certificate issued by the register upon a confirmed claim, is made evidence of the legal title. [Clay's Dig. 341, § 157.] In Bagnel v. Broderick, 13 Peters, 450, it is denied, that the States have any right to declare the dignity, and effect of titles emanating from the United States, and that a State law, declaring a certificate of the register evidence of legal title, will be disregarded by the Courts of the United States. The certificate in this case, does not come within the influence of the decision just quoted, because, as has been shown, the title is not derived from the United States. On the contrary, the act of confirmation, is a distinct admission, that the title never was in the United States, and certainly the States have the power to declare what shall be evidence of legal title to land, to which the United States never asserted title.

This conducts us to the conclusion, that the Court erred in its charge to the jury, that the patent conveyed the legal title to the heirs of Farmer, and must prevail in a Court of law, over the title of Eslava.

The objection of the counsel for the plaintiff in error, that to ascertain who are meant by the term "heirs of Robert Farmer," in the act of Congress, reference must be had to the laws of the British Province of West Florida, the domicil of Robert Farmer, is, we think, untenable. The term "heirs," must, we think, be understood to be used in the sense affixed to the term in the United States. No reason has presented itself to our minds, that Congress had in view, by the use of this term, the English law of primogeniture. It was a mere act of grace, and was doubtless intended for the benefit of the *heirs* of Farmer, in the largest sense in which that term is understood, in the United States.

We have thus examined all the questions presented on the record, which were argued in this Court, except those relating to the validity of the title of Eslava. These, although examined here, by counsel, we shall decline the examination of. The charge of the Court below, virtually excluded all this evidence from the jury, and did not pass on its validity, declaring, that

although it might be good in equity, at law the legal title of the heirs of Farmer must prevail.

In ordinary cases, we frequently endeavor to anticipate the future action of the primary tribunal, for the prevention of litigation; but in this particular class of cases, our habit is, to decide nothing more than is necessary to the determination of the case before us, and having ascertained that the Court erred, we send the case back for another trial.

Let the judgment be reversed and the cause remanded.

NOTE.—Since the opinion in this case was written out, we have seen the report of the decisions of Grignon and others v. Astor and others, 2 Howard Rep. 319, and Choteau v. Eckhart, Ib. 395, from which it would appear, that the Court held, that a confirmation, by Congress, of an incomplete title, was equivalent to a grant to the confirmee. It is, however, worthy of consideration, whether there is not a difference between the condition of claimants to land in Missouri, upon these incomplete titles, and those in this State.

BROUGHTON, ET AL. v. THE GOVERNOR, USE, &c.

1. The writ issued against B. as sheriff of Monroe county, and several persons as his sureties, but not being served on the principal the action was discontinued, and his sureties alone declared against, alledging as a breach, that B. after the execution of the bond as sheriff received divers sums of money, to wit: the sum of twenty-five hundred dollars, which was due to, and belonging to the county of M.; which though often requested he failed and refused to pay: *Held*, that although the breach was general, and omitted to state the circumstances under which the money was received, yet it was good after verdict and judgment, if not at common law, certainly under the act of 1824, "to regulate pleadings at common law."

Writ of error to the Circuit Court of Monroe.

THE writ in this case, issued against Edward T. Broughton, as sheriff of Monroe, and Nathaniel Broughton, John R. Davis, Wm. Robinson and Samuel Bozman, as his sureties; but not being served on the principal, the action, as to him, was discontinued, and the declaration was against the other defendants, (saving Bozman, who died after service of process,) on his official bond. The cause was tried on the plea of *nil debet;* the jury returned a verdict for the plaintiff, and assessed the damages at $2,501; a judgment was rendered accordingly.

The breach alledged in the declaration is, that Edward T. Broughton, after the execution of the bond, as sheriff, "received divers sums of money, to wit: the sum of twenty-five hundred dollars, which was due to, and belonging to, the county of Monroe," which, though often requested, he has failed and refused to pay.

PECK & L. CLARK for the plaintiff in error.

LESLIE, for the defendant.

COLLIER, C. J.—It is insisted for the plaintiffs in error, that the judgment of the Circuit Court cannot be sustained, because—1. The declaration does not explicitly alledge, that Edward T. Broughton was sheriff, and the other parties sued, his sureties. 2. As against the sureties it should have averred under what authority, and on what account their principal received the money. Neither of these objections, it is contended, are waived or cured by the plea and verdict.

By the act of 1824, "to regulate pleadings at common law," it is declared, that "no cause shall be reversed, arrested, or otherwise set aside, after verdict or judgment, for any matter on the face of the pleadings, not previously objected to: *Provided*, the declaration contains a substantial cause of action, and a material issue be tried thereon." [Clay's Dig. 322, § 53.]

The objections to the declaration in the case before us, would deserve serious consideration, if they had been made on demurrer; but we think they come too late after judgment. The breach alledged is, that the sheriff did not perform all the duties required of him, &c., but failed to pay over, on request, the sum of twenty-five hundred dollars, belonging to the county of Monroe, which he had received, as sheriff, &c., after the bond

recited was executed. Although it is not technically alledged, that one of the parties against whom process issued was sheriff, and the others his sureties, yet this sufficiently appears at this stage of the cause.

It would certainly have been more formal to set out with particularity the circumstances under which the money was received by the sheriff, but the general averment that he received it, as sheriff, after the execution of his bond, implies that it was collected in the performance of his official duty. This being the case, its non-payment on demand was a breach for which his sureties were liable. The plea on which the issue was tried, whatever its form, must be regarded as a denial of the defendants' liability to make good the official default of their principal; and the response of the jury, an affirmation of its falsity. It is then clear, that "the declaration contains a substantial cause of action," and *a material issue was tried thereon.*

But if the statute were placed out of view, it is by no means certain, that the effect of the verdict would not, at common law, prevent exception to the declaration. Where there is a defect, imperfection, or omission in the pleading, either in substance or form, which would have been a fatal objection on demurrer, yet if the issue joined be such as is necessarily required on the trial, proof of the facts so defectively stated, or omitted, and without which it is not to be presumed that either the judge would direct the jury to give, or the jury would have given the verdict, the verdict will operate so as to cure such defect, imperfection or omission. [2 Saund. on Plead. & Ev. 911.] But it is needless to add more, for the objections to the declaration cannot now be supported, whether the statute or common law be applied.

The judgment is consequently affirmed.

BADGER v. LYON.

1. Evidence being given of a former possession of land by a defendant in execution, accompanied by acts of ownership; and proper evidence being shown of the sale and conveyance of all his right, under a sale by the Marshal of the United States, by virtue of a judgment and execution, it is not an assumption of a fact for the Court to charge the jury, that his possession and improvements vested in him such a legal title, as to enable him to maintain ejectment against one ousting him.
2. A prior possession, accompanied by acts indicating ownership of land, by a defendant in execution, will authorize a recovery, by one having his right under a conveyance from the Marshal of the United States, against one found afterwards in possession of the same land, but showing no title.
3. A mere trespass by entry upon another's right, does not make an adverse possession; to constitute which, a claim, or color of title, is necessary.

Writ of error to the Circuit Court of Jefferson.

Trespass, by Lyon against Badger, to try title to a certain lot of land, described in the declaration.

At the trial, parol evidence was given by the plaintiff, that one Steele went into possession of the lot about the year 1827, previous to which time one King had resided on the lot. Steele continued in possession, and resided on the lot, until some time in the spring of 1840, when he left the country. From the time Steele left, the defendant came in possession, and so continued up to the time of the trial. The witness who gave this evidence, said the defendant might have lived with Steele before the latter left, and that the defendant was the son-in-law of Steele. The plaintiff also proved that Steele had put valuable improvements on the premises, by building a good kitchen, and making a good inclosure around the garden. The plaintiff had previously given in evidence a transcript of two judgments obtained in the United States Court for the middle district of Alabama, one in favor of Crumby & Draper v. Steele & Atkins, for $852 79, the other in favor of Thomas M. Lyon & Co. for $1,235 75, both obtained at the December term, 1840. Also, two executions, founded on said judgments, and then

proved and offered in evidence, a deed made by James A. Beal, as deputy for, and in the name of, R. L. Crawford, the Marshal of the United States, dated 10th August, 1841, reciting, that by virtue of the said executions, he had levied on the lot in controversy, and sold it to the plaintiff, and conveying to him the said lot as marshal. The defendant objected to the introduction of the deed, but the objection was overruled.

There was no other evidence on the part of the plaintiff, and the defendant offered none. Whereupon the Court charged the jury, that the possession of Steele, and his making valuable improvements, created in him such a legal title as would have enabled him to maintain ejectment, or trespass to try titles, against any person who might oust him; and that all the rights of Steele vested in the purchaser at the marshal's sale. To this the defendant excepted, and the matters arising upon these exceptions are here assigned as error.

Peter Martin, for the plaintiff in error, made these points:

1. The charge is erroneous in assuming the possession of the lot by Steele; this was a matter which should have been left to the jury, as a fact for their decision.

2. Badger being in possession of the lot previous to the time of the judgment against Steele, no lien attached by reason of it; and the presumption of law is, that the one in possession has the title. [2 Black. Com. 196; 2 S. & P. 83; 4 Cowen, 602.] When it becomes necessary to rebut this presumption, it must be done by documentary evidence. [3 S. & P. 60.]

3. To recover on the marshal's deed, it was necessary, in the absence of proper title, to show that Steele was in possession, when the judgment against him was rendered. [Jackson v. Town, 4 Cowen, 599; 9 Cowen, 84; McGehee v. Carter, 5 S. & P. 420.]

4. The objection to the deed is, that it was executed in the name of the marshal, but admitted to record upon the acknowledgment of the deputy.

Peck, contra, cited and relied on Whitney v. Wright, 15 Wend. 171; Jackson v. Miller, 6 Cowen, 754; Day v. Alanson, 9 Wend. 223; Heydenfeldt v. Mitchell, 6 Ala. Rep. 70.

As to the objection to the deed, its execution was proved, and not left to the jury, upon the certificate of registration.

GOLDTHWAITE, J.—The objection, that the charge assumes a fact, which should have been left to the jury to decide, we think is without any legal foundation. If the controversy between these parties was with reference to the facts of the case, it is not easy to see why the bill of exceptions should be presented in the manner it now is, for the entire frame of it, in that event, would probably have been different; as it is, Steele's possession, in effect, is conceded by the manner in which the evidence is stated. The point ruled by the Court below, is as to the effect of the possession, and had no reference whatever to the proof of it. In our judgment no presumption of error arises from the mode in which the case was put to the jury.

2. As to the other and more important questions involved in the case, we think the charge is free from error. Generally, when lands are purchased under a judicial sale, the purchaser has no access to the proper evidence of title, under which the defendant in execution held; therefore the propriety, to say nothing of the absolute necessity, in most cases, of permitting a purchaser of this description, to recover in a possessory action, upon the same, or similar, evidence as would be sufficient if the defendant in execution was the plaintiff, against one who had entered upon his title, or, being in under him, refused to surrender the possession voluntarily. It will be borne in mind, that no adverse possession is here relied on, and that the facts in evidence tend quite strongly to show, that the defendant was in by the permission, or sufferance, of the debtor, whose estate, whatever it is, the purchaser has acquired. In principle, this case does not differ from Heydenfeldt v. Mitchell, 6 Ala. Rep. 70, though the defendant in execution, there, was in possession when the judgment was recovered under which the land was subsequently sold, whilst here it had previously ceased. If the question as to the right of the debtor was to be determined upon the naked matter of possession, there, would be great force in the argument of the counsel, that the right ceased with the possession; but here, as in the case cited, the possession is accompanied with acts of amelioration with respect to the land, which, if they do not indicate absolute ownership, afford a strong presumption, at least, of a valuable interest in it: and, therefore, the removal from it, ought not to be construed as a

voluntary abandonment of a mere naked possession. Even as to such a possession, the connection of the party afterwards found upon it, with the former possessor, might be entitled to some weight, to shew a continuation of the right. In all the cases to which our attention has been called by the counsel for the plaintiff in error, the presumptions of ownership arising from a mere naked possession, were counterbalanced by opposite presumptions, growing out of the fact of abandonment unexplained.

In the case before us, the removal, under the circumstances in evidence, did not destroy the presumption of title, growing out of the previous possession, accompanied by acts of improvements done upon, and with the lot. [Jackson v. Miller, 6 Cowen, 754; Whitney v. Wright, 15 Wend. 171; Fawk v. Darnell, 5 Litt. 319.]

3. There is another aspect in which it is necessary to look at this case, for it may be that Badger entered upon the title of Steele, without his permission. This, if true, would not constitute what is termed an adverse possession, so as to turn Steele's right, or title, into a mere right of action—even if such a right is incapable of sale under a judgment and execution—a question upon which no opinion is intended to be intimated. All the authorities concur that a mere trespass, by entry, upon another's land, does not make an adverse possession, to constitute which, a claim or color of title is necessary. [Jackson v. Todd, 3 Caines, 183; J. v. Ellis, 13 John. 118; Smith v. Barton, 9 Ib. 174; J. v. Smith, 8 Cowen, 589; 2 Bibb, 506; Gay v. Moffat, 4 Mon. 138.]

It is, then, entirely immaterial whether Badger entered under Steele, and held by his permission and sufferance, or as an intruder upon his right, as, in either event, the title of Steele, was not so changed or divested as to be incapable of sale. And the result is, that the Court placed the cause before the jury upon a ground quite proper, under the circumstances in evidence.

As to the point made upon the admission of the marshal's deed to the jury, the execution of it by the deputy seems to have been proved, therefore the question did not arise, that it was admitted upon the registration of his acknowledgment.

Judgment affirmed.

SPENCE & STINNETT v. WALKER.

1. Issue being tendered to the facts recited in a petition, upon which an execution had been superseded, and the petitioner declining to join in the issue, and offering no testimony in support of it, but desiring to take a nonsuit, the Court was justified in rendering judgment against him and his surety.

Error to the County Court of Talladega.

THIS proceeding was a *supersedeas*, obtained by the plaintiff in error, Spence, to an execution which had issued against him, on a judgment of this Court, as surety to a writ of error bond. At the return term of the *supersedeas*, the defendant demurred to the petition, and his demurrer being overruled, he traversed the facts of the petition in the following words: "And the said Walker comes by attorney, and denies the statement and matters in the foregoing petition contained, and takes issue thereon;" to which the plaintiff replied, "that he ought not to be precluded, by any thing in said defendant's traverse joined, because he says, the same is not in law sufficient to bar the plaintiff his said remedy, sought by his petition, and this he is ready to verify, wherefore he prays judgment, that said defendant answer over," &c.

The plaintiff's counsel moved the Court, to strike out this writing, which motion the Court granted. The counsel for the plaintiff then stated they would take a nonsuit, and refused to offer any evidence in support of the petition, or to proceed further in the cause, although the defendant's counsel announced his readiness to go to the jury, on the issue taken by him.

The Court then rendered judgment against the plaintiff, and Stinnett as his surety, on the bond for the *supersedeas*.

The assignments of error are—

1. In overruling the demurrer to the traverse of the defendants below.

2. In rendering judgment.

W. P. CHILTON and BOWDON, for plaintiff in error.

RICE, contra.

ORMOND, J.—As the plaintiff below refused to join issue with the defendant, upon the facts of the petition for the *supersedeas*, and desired to take a nonsuit, there was no course left for the Court but to render judgment. Such, indeed, should have been the judgment of the Court upon the demurrer to the petition, which shows no reason whatever for superseding the execution. Let the judgment be affirmed.

WHITE v. TOLES & DUNLAP, USE, &c.

1. T. & D. were mechanics working in partnership; T. agreed with W. to do some work on his house, for which the latter was to pay him in board; there was no evidence to show whether D. was present when the contract was made, or that he knew anything of its terms. Both T. & D. did the work, and T. boarded with W. while they were doing the work, and for a sufficient length of time thereafter, for his board to amount to a sum equal to the price of the work: *Held*, that the contract was valid, and that the work being paid for as stipulated, an action could not be supported to recover the price of it, in consequence of any interest of D.

Writ of error to the County Court of Greene.

THE defendants in error declared against the plaintiff for work and labor done, goods, wares, &c. sold and delivered, and upon an account stated. The cause was tried upon the pleas of non-assumpsit, payment and set off; the jury returned a verdict for the plaintiff below, and judgment was rendered accordingly. On the trial the defendant excepted to certain decisions of the Court. From the bill of exceptions, it appears that the plaintiff, Toles, contracted with the defendant to put tin gutters to his house, the latter undertaking "to pay for the

work by board." Both the plaintiffs put up guttering to the value of about eighty dollars; and while they were doing the work, Toles boarded with the defendant, and continued to board with him, at least eight or nine months. There was no evidence to show, that Dunlap was, or was not present, at the time the contract was made between Toles and the defendant; nor was there any evidence as to Dunlap's knowledge of the terms of the contract. The plaintiffs were partners when they did the work.

The defendant's counsel prayed the Court to charge the jury, that if Toles, one of the partners, made a contract with the defendant to put guttering to his dwelling house, and it was at the same time agreed, that the latter was to pay for the work by board, and that Toles did board with him until the sum due therefor was equal to the value of the guttering, then the plaintiffs could not sustain their suit, but their demand would be satisfied. This charge was refused; and the Court charged the jury, that the board would not be a satisfaction of the plaintiffs' demand, unless the defendant and Toles had settled and passed receipts, or had in fact made a final settlement of their accounts.

A. Graham, (of Greene,) for the plaintiff in error.

S. F. Hale, for the defendants in error, insisted, that Dunlap was not bound by the contract between Toles and the defendant; for there is no evidence from which his assent to it may be implied. [Pierce & Baldwin v. Pass & Co. 1 Porter's Rep. 232; Evrnghim v. Ensworth, 7 Wend. Rep. 326.]

COLLIER, C. J.—Partnership is defined to be a voluntary contract, between two or more persons, for joining together their money, goods, labor, and skill, or either, or all of them, upon an agreement, that the gain or loss, shall be divided proportionably between them. [Wat. on Part. 1; Story on Part. 2; Collyer on Part. 2.] This definition very clearly indicates, that partnerships are not restricted to a business in which parties unite their money or property, but they may also embrace a union of labor, or skill. It may then be conceded, that all the incidents of a partnership so far as appropriate, attached

to the act or occupation of the plaintiffs; and upon this assumption we will consider the case.

In Pierce & Baldwin v. Pass & Co., 1 Porter's Rep. 232, the plaintiffs declared against the defendants for goods sold and delivered; the defendants proved an agreement between themselves and Pierce, one of the defendants, that the goods, for the price of which the action was brought, were to be taken in payment for the board of Pierce. It was not proved, that Baldwin consented to this agreement, or had any knowledge of it. The Court said, "All the authorities concur in the position, that the individual debts of a partner may be chargeable upon the firm, by the contract of one member, if the other partners assent to such a charge." Further, according to the English decisions, the presumption is against the partnership, and the *onus* of showing a fraudulent collusion between the creditor and individual partner, or, at least, a want of authority on the part of the latter, rests on the partnership. Again, say the Court, "The charge should have been, that if the jury believed from all the evidence in the case, that Baldwin, either by implication, or expressly agreed to, or authorized the appropriation of the firm effects, to the satisfaction of the tavern account of Pierce, that then the set off was good against the plaintiff."

It has been held, that where one partner delivers the property of the partnership in payment of his private debt, the person so receiving it, is liable to the firm in an action for goods sold and delivered, if he was aware that they were the owners of the property. In such case, it is said, that it makes no difference whether the note of the firm be given, or the partnership property applied, to pay the individual debt of a partner. The act in either case, is an appropriation of the joint estate to the purposes of a single member of the firm. [Dob v. Halsey, 16 Johns. Rep. 34.] In Gram & Stewart v. Caldwell, 5 Cow. Rep. 489, it was decided, that one partner could not release a debt due to the firm, in order to extinguish his individual liability. So a joint debt due a partnership, cannot be discharged by one of the partners applying it in payment of an individual debt, owing by him to the debtor of the firm, without the knowledge and approbation of the other members of the concern. [Evernghim v. Ensworth, 7 Wend. Rep. 326;

see also, Lansing v. Hastie, 2 Caine's Rep. 246; Lansing v. Gaine, 2 Johns. Rep. 300; Livington v. Roosevelt, 4 Id. 251; Dubois v. Roosevelt, Id. 262, n; Laverty v. Burr, 1 Wend. Rep. 529; 3 Kent's Com. 41-3; Rogers v. Batchelor, 12 Peter's Rep. 229; Story on Partn. 197 to 212, and notes; Collyer on Partn. 279, et post; Holme v. Karpser, 5 Binn. Rep. 471; Baird v. Cochran, et al, 4 Sergt. & R. Rep. 397; Bank of Rochester v. Bowen, et al, 7 Wend. Rep. 158; Boyd, et al, v. Plumb, et al, Id. 309; Gansevoort v. Williams & Johnson, 14 Id. 133; Joyce v. Williams, Id. 141; Wilson v. Williams, Id. 146.] It will appear from the citations, that the partnership will be bound, unless third persons had notice, or reason to believe, that the partner who used the firm name, or effects, was acting on his individual account; and although a bill or note may not be binding on the partnership in the hands of the first holder, yet it may afterwards become a valid security, if passed to an innocent indorsee. Further, that where a bill or note is given by one partner on his separate account, in the partnership name, the *onus* of proving the authority, or consent of the copartners lies on the holder. See further, Foot v. Sabin, 19 Johns. Rep. 54; Rolston v. Click, et al, 1 Stewart Rep. 526.

We have stated the law thus at length, that the principles on which it was attempted to sustain the judgment of the County Court, and the foundation on which they rest may be seen. The present case is, in our judgment, clearly distinguishable from those cited for the defendants in error. Here it will be observed, that the defendant engaged one of the plaintiffs to do work for him of the same description that both the plaintiffs were employed about as partners, and agreed to pay him therefore in board. Now the mode of payment was a part of the contract, and it must be supposed, induced the defendant to enter into it, and the question is, whether, in this view of the case, if the defendant has paid according to his undertaking, the right of action in favor of the plaintiffs is not extinguished.

In Pierce & Baldwin v. Pass & Co., it does not appear that Pierce agreed with the defendants previous to the purchase of the goods, that an account to be afterwards made with them for board, would be received in payment. True, it was prov-

ed, that it was agreed between Pierce and the defendants, that the account for board was to be liquidated by goods from the plaintiff's store. It may perhaps be assumed, that the goods, or no part of them, had been previously purchased, especially as it is stated that only one witness proved that the account for board had been incurred by Pierce, before the defendants purchased the goods from the plaintiffs, while the others testified the reverse. If this were the true state of the case, then the agreement of Pierce to sell the goods of plaintiffs to pay his debt, would be an appropriation of the joint property to his individual use, and this too, when the party receiving it was aware of the fact. The case of Dob v. Halsey, and others already cited, shows that such a transaction would be a fraud on the partnership which cannot be tolerated; and that the price of goods thus acquired, may be recovered by an action in the firm name for goods sold and delivered.

A partnership formed for commercial purposes, or for the joint employment of labour and skill, may agree to receive in payment of goods, not only money, but something else which is regarded as an equivalent, and it is alike competent for the firm to consent to be thus compensated for work done and materials furnished. If the partners conjointly possess this power, we can conceive of no reason why such a contract in favor of third persons acting *bona fide*, would not be enforced. It is said, one of the most important doctrines attaching to the relation of partners, is, that the contract, or other act of any member of the associated body in matters relating to the joint concern, is, in point of law, the contract, or act of the whole, and consequently binding upon all. This doctrine is said to be established for the benefit of commerce, and more especially founded on the principle, that each partner impliedly constitutes the other his agent, in matters relating to the business of the partnership; so that by the act of the agent the principal is bound. [2 Step. Com. 150, Story on Partn. 1.] True, if the person with whom the single partner deals, is conscious, that the latter is transcending the power actually accorded by his copartners, then the transaction would be a fraud on the latter, and they would not be bound by it. [2 Step. Com. 151; Story on Partn. 197–210.] Although fraud is *prima facie* imputable to the individual partner and person

dealing with him, yet it is said to be allowable for the latter to repel the imputation, by proof, that the act was approved by the firm, or from other circumstances, it was "*bona fide*, and unexceptionable, although it went to the discharge of the private debt by one partner only." [Story on Partn. 199, and citations in notes.]

The contract in the present case, does not show any thing of unfairness, or *mala fides* on the part of the defendant; it does not appear that he knew that Toles and Dunlap were in partnership, or that the contract was made with the former, with the expectation, that the firm would perform it. But we have considered the case upon the assumption, that the defendant possessed this knowledge, and contracted with the partnership. It cannot be assumed that the agreement to receive pay in board was prejudicial to Dunlap, or that he was not informed of, and did not approve it; especially as he participated in the labor. The mode of payment must be regarded as an inducement to the defendant to enter into the contract, and after it has been performed by the plaintiffs and payment made in good faith, as stipulated by the defendant, an action cannot be maintained by the firm. To coerce the defendant to pay a second time, would be to charge him beyond his contract, or any thing that can be implied from it, in consequence of the *mala fides* of Toles, (if indeed there be fraud;) and although no fault is attributable to him.

In no view in which the case has been presented to us, can the ruling of the County Court be supported. Its judgment is therefore reversed, and the cause remanded.

RHODES v. IJAMES.

1. In an action of slander the character of the plaintiff is not in issue before the jury, unless it is attacked by plea of justification, or by evidence at the trial; evidence therefore of his good character is inadmissible in the first instance, and before evidence to impeach it has been offered by the defendant.

Writ of error to the Circuit Court of Lauderdale County.

ACTION of slander by Ijames against Rhodes, in which the words charged to be spoken accused the plaintiff of hog stealing.

At the trial, upon the general issue, the plaintiff, after having proved the speaking by the defendant, of the slanderous words charged in the declaration, and before any evidence was offered by the defendant, either by cross-examination or otherwise, offered evidence to prove himself a man of good and unimpeached character, before the publication of the slander of the defendant. The defendant objected to such evidence at that stage of the trial, but the Court overruled the objection, and admitted the evidence. The defendant excepted, and a verdict and judgment having passed against him, now assigns the evidence so admitted as error.

NOOE, for the plaintiff in error, cited Inman v. Foster, 8 Wend. 602; 2 Starkie's Ev. 370; 5 Pick, 246.

WM. COOPER, contra, insisted, that the slanderous words spoken by the defendant, of the plaintiff, involved his character, and therefore he had the right to show that it was good. The authorities cited on the other side, leave the legal question doubtful, and do not fully show what the rule is. Starkie admits the evidence may be given where the issue involves the question of character. [2 Starkie, 366.] And it is difficult to conceive how character can be more directly involved than it is in this case.

GOLDTHWAITE, J.—The general rule in relation to evidence of character, is thus stated, by Mr. Greenleaf, in his late work on evidence: "In civil cases, such evidence is not admitted, unless the nature of the action involves the general character of the party, or goes directly to affect it;" and he seems to consider the action of slander as presenting no exception to this rule, so far as the plaintiff is concerned, for he says, "whether evidence impeaching the plaintiff's previous general character is admissible, as affecting the question of damages, is a point which has been much controverted, but the weight of authority is in favor of admitting such evidence. [Greenl. on Ev. 61, §§ 54, 55.] Starkie states the rule in terms not very dissimilar, and after citing the case of King v. Waring, 5 Esp.

13, where the plaintiff was permitted to produce evidence of general good character, before any evidence to the contrary had been given on the other side, although no justification was pleaded, condemns the decision, and insists that the character of the plaintiff is not in issue, unless attacked, when there is no plea of justification. [2 Starkie, 367, 370.] In two more recent cases, the English Courts have refused to permit the defendant even to offer evidence of the general bad character of the plaintiff, upon the ground that it was irrelevant. [Cornwall v. Richardson, Ry. & Mood. 305; Jones v. Stevens, 11 Price, 235.] The American cases, in general, hold the rule in its more limited sense. [See them collected in Greenl. on Ev. 62, § 55, note 8; Cowen and Hill's notes, 456.] Philips says, that where slanderous expressions are used in giving the character of a servant, evidence of his good character is admissible, in the first instance, on the ground that his character is, in some degree, in issue; and that it is incumbent on him to prove express malice. [2 Philips' Ev. 248, citing King v. Waring, 5 Esp. 13, and Rogers v. Clifton, 3 B. & P. 587.] In Harding v. Brooks, 5 Pick. 244, and Inman v. Foster, 8 Wend. 602, the question raised here was not directly presented, but it is evident the Courts considered the plaintiff's character as not in issue, unless expressly put before the jury, by a justification on the record, or by evidence from the defendant attacking it. The only cases in which a contrary rule is expressly held, so far as we have been able to ascertain, are those before cited, of Rogers v. Clifton, 3 B. & P. 583, and King v. Waring, 5 Esp. 13, the authority of which is either denied by later cases, or these considered as exceptions to the general rule.

Under the influence of the cases cited, we consider that the character of the plaintiff is not placed in issue until it is attacked by the defendant, either by plea upon the record, or by evidence at the trial.

From this it results that the Circuit Court erred in admitting the evidence at the stage of the trial when it was offered.

Judgment reversed and cause remanded.

BRANCH BANK OF MOBILE v. THE ADM'RS. OF MURPHY.

1. The statute authorizing the amendment of writs of error, authorizes an amendment of the writ, whenever the record furnishes the means of doing it.

Error to the County Court of Clarke county.

PECK, for the defendant in error, moved to dismiss the writ of error.

BLOUNT, contra, moved to amend.

ORMOND, J.—This writ is sued out after a final settlement of an insolvent estate, by the plaintiff in error, who was one of the creditors. This question has been frequently before the Court, but never in the precise aspect in which it is now presented. In Clarke v. West, 5 Ala. Rep. 126, it was held, that where the administrator of an insolvent estate wished to revise the final decree, all the creditors would be necessary parties to the writ, as in no other way could the unity of the cause be preserved; and also, because a reversal of the decree as to one creditor, would avoid the judgment as to all.

This case is the converse of that, but is in principle the same, and it is therefore necessary that all the creditors should join in the writ of error. If but one complains, he can join the others in the writ, and each may assign such errors individually, as affect their interest. The writ of error must therefore be dismissed, unless it can be amended under the recent statute authorizing the amendment of writs of error.

The act provides, that "all writs of error, wherein there shall be any variance from the original record, either in the name, or number, of the parties, the form of the action, or other defect, may and shall be amended, and made agreeable to the record." This comprehensive statute, authorizes the amendment of the writ, whenever the record furnishes the means of doing it. The writ was sued out by the Bank against "the estate of John Murphy, deceased," and comes within the letter of the

act. There is a defect in the "number" of the plaintiffs, and in the "name" of the defendants, and the record discloses the true state of the case. The record will therefore be amended, so as to unite the creditors of the estate as plaintiffs, with the plaintiff in error, and to make the administrators parties defendant.

DUCKWORTH v. JOHNSTON.

1. A warrant issued by a justice of the peace, and affidavit on which it was founded, alledging that the defendant therein "has property in his hands in a fraudulent condition," does not charge an offence known to the law; and the officer who executed, as well as the person who caused it to be issued, are liable in trespass to the party arrested.

Writ of error to the Circuit Court of Shelby.

THIS was an action of trespass *vi et armis*, at the suit of the defendant in error, against the plaintiff. The declaration charges, that the defendant, with force and arms, wrongfully and maliciously assaulted and seized the plaintiff, and detained him in custody, without any reasonable or probable cause, for the space of fifteen hours. The cause was tried on the plea of *not guilty;* and on the trial the defendant excepted to the ruling of the Court. From the bill of exceptions, it appears that the plaintiff was arrested at his own house, by a constable, under a warrant, as follows: "Whereas, complaint has been made before me, N. Lee, a justice of the peace, by Obadiah Duckworth, that Thomas Johnston has property in his hands in a fraudulent condition. These are therefore to command any legal officer of said county, to apprehend the said Johnston, and bring him forthwith before me, or some other justice of the peace, at," &c. "that he may be dealt with according to law," &c. The

defendant's counsel prayed the Court to charge the jury, that the warrant was not void, and that the action of trespass would not lie; but this instruction was refused—the Court charged that the warrant was void, and that the action was not misconceived. *Further*, if the constable arrested the plaintiff in virtue of the warrant, he was a trespasser, and all persons who aided or assisted in such arrest, or procured it to be made, were also trespassers. Thereupon the jury returned a verdict for the plaintiff, and judgment was rendered accordingly.

PECK, for the plaintiff in error.

W. P. CHILTON and F. W. BOWDON, for the defendant, to show that the warrant did not conform to the statute, which makes the fraudulent conveyance of property, with intent to hinder and delay creditors, an indictable offence, cited Clay's Digest, 419, §19. The justice of the peace had no jurisdiction of the matter stated in the warrant. [2 Strange's Rep. 993; 11 Johns. Rep. 444; 11 Wend. Rep. 31; 12 Johns. Rep. 257; 2 Stew. Rep. 412.]

COLLIER, C. J.—The terms of the warrant under which the defendant caused the plaintiff to be arrested, are indeed unusual, and we are at a loss to conjecture the authority for issuing it, or the object proposed to be effected by it. By the first section of the act of 1841, "to extend the jurisdiction of justices of the peace in certain cases," (Clay's Dig. 358,) it is enacted that "any one justice of the peace shall have jurisdiction in all cases of damages, whether the same arose from matter of contract, or any kind of tort, or wrong done, whatever, (except actions of slander,) where the damages claimed by the plaintiff do not exceed twenty dollars: *Provided*, that either party shall have the right to an appeal from the judgment of the justice to the next superior Court of the county."

The nineteenth section of the fourth chapter of the "Penal Code," provides, that "every person who shall make or receive any conveyance, deed or other writing, of real or personal property, with intent to delay, hinder and defraud creditors, shall, on conviction, be fined, not less than fifty dollars, nor more than one thousand dollars, and may, at the discretion of the jury, be imprisoned in the county jail for a period not exceeding six months." [Clay's Dig. 419.]

The precept to the constable is, in form, a *capias;* it is a command to the officer to apprehend the defendant in the warrant, and bring him forthwith before some justice of the peace, that he may be dealt with according to law. The mandate is not given *in totidem verbis* in the name of the State, but it is sufficiently apparent from the phraseology employed, that it was the initiatory process in a criminal prosecution. If the warrant had been framed in reference to the first act cited, it would have been, in form, a summons, and in the name of an individual seeking to recover for what he supposed to be a breach of contract, or a tort.

In general terms, the charge made by the defendant against the plaintiff, was, that "he has (had) property in his hands in a fraudulent condition;" and it is for this undefined allegation that the warrant for his arrest issued. Now the mere fact that one is the custodian of property, in fraud of the rights of others, or holds it to the prejudice of his own, or third persons creditors, will not subject him to proceedings at the instance of the State. The sixteenth section of the ninth chapter of the Penal Code, (Clay's Dig. 447,) after designating the officers who shall issue process against persons charged with criminal offences, prescribes the rules and regulations under which they are to act, in the following terms: "Upon complaint being made to any such magistrate, that a criminal offence has been committed, it shall be the duty of such magistrate to examine, on oath, the complainant, and any witnesses who may be produced by him, and shall cause the same to be subscribed by the parties examined; and if it shall appear that any such offence has been committed, the magistrate shall issue a warrant reciting the substance of the accusation, requiring the officer to whom it is directed, forthwith to take the person accused, and bring him before the said magistrate, or some other magistrate of the county, to be dealt with according to law." The warrant in the present case, it must be intended, recites the substance of the accusation; but it is defective, because the accusation itself, though true, is not criminally punished. Conceding that we may look behind the warrant, to the affidavit, and the defect will not be cured. The affidavit which the warrant recites as its predicate, does not charge an offence, and for any thing appearing upon either, the entire proceeding was *coram non judice.*

We have examined the act of 1812, which prescribes a mode of trying whether a conveyance by a debtor of his property, was made in fraud of the rights of creditors, (Clay's Dig. 211, § 51 ;) as well as the act of 1839, "to abolish imprisonment for debt," (Meek's Sup. 104-6,) which authorizes proceedings where the debtor is supposed to have fraudulently disposed of his estate or effects, &c.; but neither of these acts lend any support to the warrant in question.

The case stated in the warrant, being without the jurisdiction of the justice of the peace, it necessarily follows that the warrant is void for defects apparent upon its face ; and the only remaining inquiry is, whether, under such circumstances, the action is misconceived.

It is laid down, that where the court has jurisdiction of the cause, and merely proceeds erroneously, an action does not lie against the party who sues, or the officer or minister of the Court, who executes the precept or process. [10 Coke's Rep. 76, a ; 3 Caine's Rep, 267, 274 ; 7 Cow. Rep. 269 ; 19 Johns. Rep. 3.] But if the Court have no jurisdiction of the cause, the whole proceeding is *coram non judice ;* and an action will lie against them, without any regard to the precept or process. [2 Wils. Rep. 384 ; 8 T. Rep. 424 ; 5 M. & S. Rep. 314.] In Easton v. Callendar, 11 Wend. Rep. 94, it is said, that "where the party or inferior magistrate, or any one acting in that character, extends the power of the Court, or statute, to a case to which it cannot be lawfully extended, they become trespassers, and are amenable to the party aggrieved, as such." [See, also, 13 Johns. Rep. 444 ; 11 Wend. Rep. 31.] In Savacool v. Boughton, 5 Wend. Rep. 180-1, Mr. Justice Marcy considers it to be clear law, that where an inferior Court has not jurisdiction of the subject matter, or, having it, has not jurisdiction of the person of the defendant, all its proceedings are absolutely void ; neither the members of the Court nor the plaintiff, (if he procured or assented to the proceeding,) can derive any protection from them, when prosecuted by a party aggrieved thereby. *Again*, if a mere ministerial officer executes any process, upon the face of which it appears that the Court which issued it had not jurisdiction of the subject matter, or of the person against whom it is directed, such process will afford him no protection for acts done under it. *And lastly*, if the subject matter of a

suit is within the jurisdiction of a Court, but there is a want of jurisdiction as to the person or place, the officer who executes process issued in such suit, is no trespasser, unless the want of jurisdiction appears by such process. [See, also, Bul. N. P. 83; Willes' Rep. 32, and cases cited there by Lord Ch. J. Willes; 13 Johns. Rep. 444; 11 Id. 444; 12 Id. 257; 15 Id. 152; 10 Wend. Rep. 128; 7 Wend. Rep. 200; 16 Id. 574; 2 Stew. Rep. 412.]

Where injury is done to a person by the regular process of a competent Court, although it may have been the result of malice, case is said to be the proper remedy, and trespass is not sustainable. [1 T. Rep. 535; 3 Id. 185; 6 Id. 315; 3 Starkie's Ev. 1446; 2 Conn. Rep. 700; 9 Id. 141, 148; 1 Chitty's Plead. 187-8; 6 Wend. Rep. 382.]

Having determined that the warrant was a nullity, it follows necessarily, that it should not have been executed; and the authorities cited, conclusively show that not only the officer, but the party who caused it to be issued, are liable in trespass to the plaintiff. The consequence is, that the judgment of the Circuit Court must be affirmed.

POWELL, ET AL. v. POWELL, ADM'RX.

1. A writ of error cannot be sued out upon directions to the master as to the effect of certain allegations and exhibits in the answer, where the reference does not finally dispose of the cause.
2. One co-legatee cannot make herself a competent witness to increase the distributive sum of her co-legatees, by releasing to them her interest in the legacy; and her deposition, under such circumstances, may properly be suppressed.
3. When an account is called for by the bill, and given in the answer, it is responsive matter, and entitled to be considered as evidence.

Writ of error to the Court of Chancery for the 12th District, of the Southern division.

This bill was filed by Thomas A. Powell and others, claiming to be the devisees of Drury Powell, deceased, against Martha A. Powell, as administratrix of Seymour Powell, deceased, who in his lifetime was the sole executor of the will of the said Drury Powell.

The case made by the bill is, that the intestate of the defendant qualified as the sole executor of the will of Drury Powell, and proceeded to settle his estate in the progress of which he received large sums of money, and subsequently died, without having settled with the legatees under the will. This will is made an exhibit, and from that it appears that Nancy W. Powell, the widow of the testator, is made a legatee in common with his four children, of all his estate, not specifically bequeathed. Mrs. Powell is not a party to the bill, and it is charged, that she has assigned and transferred her interest in the estate, (having subsequently married one Keener, who died, leaving her surviving,) to the co-legatees, who are the only complainants. The bill charges, that Seymour Powell in his lifetime kept accounts of the receipts and disbursements of the estate, and prays that they may be exhibited.

The answer of the defendant denies that any considerable sum is due from the estate of her intestate on account of his administration of Drury Powell's estate. Admits that a balance of about thirty dollars remained in his hands unaccounted for at the time of his death, and asserts that she, as his administratrix, has always been willing to pay this, but that the complainants "have refused to settle, on this basis, as they claim from her, as administratrix, more than twelve hundred dollars." She sets out an account stated by her intestate in his lifetime, showing a sum due from the estate of Drury Powell to him, and states another from memoranda, sale bills, &c. in the possession of her intestate in his lifetime, and many in his handwriting, showing a balance due the legatees as before stated.

The deposition of Mrs. Keener, otherwise Mrs. Nancy W. Powell, was taken on behalf of the complainants, in which she testifies to the admissions of Powell in his lifetime, that

the sum of twelve hundred dollars was in his hands for distribution to the legatees. Other witnesses were examined on the part of the defendant, who state facts and circumstances tending to show that Mrs. Keener might possibly have mistaken the admission of Seymour Powell, and that instead of money in his hands for distribution, the twelve hundred dollars, was in notes and assets of the estate, which subsequent to his death, were taken by the administrator *de bonis non* of Drury Powell, and by him collected.

On a motion made to refer the accounts to a master to be stated, and also to suppress the testimony of Mrs. Keener, the Chancellor directed that her deposition should be suppressed, as that of an incompetent witness, and that the account exhibited by the defendant in her answer, as in the hand writing of her intestate, should be received as *prima facie* evidence of the matters therein stated. No final report was made by the master under the reference, but at this stage of the proceedings the complainants sued out their writ of error, and here assign that the Chancellor erred in suppressing the deposition of Mrs. Keener, and also in the directions given to the master.

Thos. Williams, for the plaintiff in error.

Cook, contra, cited Murray v. Mason, 8 Porter, 291; Goodwin v. Lloyd, Ib. 237.

GOLDTHWAITE, J.—1. The writ of error is prematurely sued out, as there is no final decree in the cause. The direction given by the Chancellor upon the reference to the master, is, most probably decisive of the case, but this will not warrant us in assuming that the decree would be for the defendant. The writ of error must be dismissed.

But as the cause is here, and may return upon us again, without some expression of opinion upon the questions raised by the assignments of error, we shall briefly examine them.

2. The deposition of Mrs. Keener was properly suppressed, as she cannot support by her testimony the title in the complainants, which she herself has created. The question indeed is precisely the same as that decided in Murray v. Mason, 8 Porter, 201.

3. The bill calls upon the defendant to exhibit all accounts

and memoranda, made by her intestate in his lifetime in reference to the settlement of the estate, and in her answer she exhibits precisely what is called for. This is certainly responsive matter, and certainly is entitled to at least the weight the Chancellor directed it to have.

We think, therefore, in both matters, the Chancellor was right. Writ of error dismissed.

GUNN v. HARRISON.

1. Where the creditors of a vendor, levy executions on the property in the hands of the vendee, Chancery will not interpose at the instance of the latter, as he has an adequate remedy at law, by a trial of the right under the statute, or by an action for the trespass.
2. In general, a bill of peace cannot be sustained, until the complainant has ascertained his right at law.
3. A Court of Chancery will not interfere, and prevent the creditors of a vendor, from pursuing the property in the hands of the vendee, because the vendor, has other property in his hands, sufficient to satisfy their debts, which by his contract, he should have delivered to his vendee.

Error to the Chancery Court of Barbour.

The bill was filed by the plaintiff in error, and charges the purchase by the complainant, of certain lands, and slaves of one Betts, and that he agreed in part consideration thereof, to pay one thousand dollars, towards satisfying a judgment then subsisting against the vendor, and a debt due by him to the Bank at Montgomery—that he received a deed for the land and slaves so purchased, and went into possession thereof—that two other creditors of Betts have since obtained judgment against him, and one other has commenced a suit by attachment against him, all of which have been levied on the property

so purchased by complainant, although the vendor has other slaves in his possession, liable to the satisfaction of the debts, which have been pointed out to the sheriff.

That at the time the purchase was made, it was further agreed, that complainant would pay four hundred dollars more towards the satisfaction of the debts of the vendor, if he would procure his wife's relinquishment of dower, to the land, which he has failed to do.

The complainant further alledges, that he has paid, or assumed the debts he was bound to extinguish, and that sundry articles of personal property, which were included in the purchase, have been withheld from him, amounting to three hundred and fifty dollars in value.

The prayer of the bill, is, for an injunction, to prevent the property so purchased, from being levied on to satisfy the debts of Betts, the vendor, which was granted by a Circuit Judge.

The Chancellor on motion, considering that the bill afforded evidence, that the sale was made to hinder and delay creditors, and also, that the complainant had an adequate remedy at law, dismissed the bill.

The cause was submitted without argument.

ORMOND, J.—We do not think this bill is obnoxious to the objection, that the contract appears on its faee, to have been made to defraud creditors. The Chancellor seems to have supposed, that because the consideration appeared to be grossly inadequate, and the contract was made on the eve of judgment's being obtained, and whilst some were in force, and unsatisfied, the contract was therefore fraudulent as against creditors. The answer to this, is, that the entire contract is not set out, either in the bill, or in the deed of conveyance appended as an exhibit, nor does the bill afford any means of ascertaining the fact; and although it may be admitted, that the contract appears suspicious, there is not sufficient evidence disclosed in the bill, to enable the Court to pronounce it fraudulent.

We think, however, that the other ground taken by the Chancellor, must prevail—that the complainant has a complete and adequate remedy at law. No reason whatever is shown in the bill, for compelling the creditors of Betts, to liti-

gate this matter in a Court of Chancery. If they improperly levy their judgments, on property belonging to the complainant, the statute which authorizes him to interpose his claim and arrest the progress of the execution, is a cheap and adequate remedy at law, where, for any thing shown in the bill, the true question between the parties—whether the sale from Betts to the complainant was fraudulent, or not, could be ascertained as well, if not better than in Chancery. Or, if the complainant did not think proper thus to interpose and arrest the sale of the property, he would have an adequate remedy at law against all the parties concerned in the sale.

The bill cannot be maintained, as a bill of peace, not only because the parties litigant, are not sufficiently numerous to entitle the complainant to ask the interposition of Chancery, but also, because the complainant has not established his right at law, against those he seeks to enjoin. It is true, there are cases, in which the Court will thus interfere, when the right has not been tried at law, the object being to prevent multiplicity of suits. The case of Morgan v. Morgan, 3 Stew. Rep. 383, is an instance of that kind; but these are exceptions to the general rule, which is, that the complainant must first establish his right at law. [Story's Com. on Equity, 147; 2 Johns. Chan. 281; 2 Atk. 483.] To allow a bill to be filed, in such a case as the present, would, in effect, draw to the Court of Chancery, the trial of all controversies, where the creditors of a grantor alledge a deed to be fraudulent, and caused their execution to be levied on the property. In this case, but two judgment creditors of Betts have levied on the property, and a third caused an attachment to be issued, and levied—the right of the complainant to this property has never been tried at law, and no reason is shown, why these suits may not progress and be tried at law, with much less expense, and inconvenience to all parties, than they could be tried in Chancery. As, therefore, this bill cannot be maintained as a bill of peace, and as no reason is shown, why the complainant cannot have as full, and adequate a remedy at law, as he could in Chancery, the bill was properly dismissed.

There is an obscure statement in the bill, from which it may be inferred, that the vendor has not complied with the contract, by delivering up some articles of personal property included

in the purchase, but it is not shown that the complainant has not a sufficient remedy at law for this breach of the contract; nor is the bill filed for a specific performance. The fact, if it exists, affords no ground whatever for arresting the pursuit of the creditors of Betts, against the property which was delivered. Nor does the allegation, that Betts had other property in possession, sufficient to pay the debts, interpose any obstacle. The creditors have the right to subject any property which belongs to the debtor, to the satisfaction of their debts. For aught this Court can know, the property in his possession, is covered by other claims. Be this as it may, the right of the creditor to levy at his peril, on any property he claims to be the property of the debtor is indisputable.

The rule relied on is, that where there are two funds to one of which only one creditor can resort, whilst the other can resort to both, a Court of Chancery will compel the creditor, who can resort to both funds, to seek satisfaction of his debt, in such a way as not to defeat the rights of the other creditor. It is obvious, this rule has no application to a case, where the creditor goes against the property of his debtor in the hands of another, on the ground of fraud.

Let the decree be affirmed.

BRITT v. BURK.

1. A memorandum made by the defendant after the adjournment of the Court, upon the papers of a cause which had been dismissed, consenting to reinstate it, cannot be regarded as a part of the record, and will not bar a writ of error, or prevent the revising Court from correcting the erroneous dismissal.

Writ of error to the Circuit Court of Benton.

S. F. Rice, for the plaintiff in error.

T. A. Walker, for the defendant in error.

COLLIER, C. J.—The question presented upon the bill of exceptions is this—if an order is made requiring anon-resident plaintiff to give security for costs, "on or before the first day of the next term of the Court," is it competent for the plaintiff to give security at the calling of the cause, after the first day of the term. The Judge of the Circuit Court decided this question against the plaintiff, and dismissed his suit. We laid down the law otherwise, in Lyon v. Long, 6 Ala. Rep. 103; and upon the authority of that case the decision is erroneous.

But the defendant insists that the plaintiff should not be allowed to avail himself of the error; because he admitted it, and consented to a reinstatement of the cause on the docket of the Circuit Court. In the transcript there is a memorandum dated after the adjournment of the Court, and signed by the counsel for the plaintiff below, in which it is admitted that the cause was improperly dismissed, and consenting that it might be placed upon the docket again. We cannot regard this a part of the record, and without considering what would be its effect, if we could, the judgment must be reversed and the cause remanded.

BRANCH BANK AT MONTGOMERY v. WILKINS.

1. A settlement by a husband after marriage of the property thereby acquired to a trustee, for the joint use of himself and wife, for their lives, with remainder for life to the survivor, and remainder in fee to the issue of the marriage, is not the conveyance of a separate estate to the wife, but the husband has under the deed an estate for life.
2. Such an estate is subject to execution and sale for the debts of the husband; the deed containing a stipulation that he shall have the possession, and be entitled to the rents and profits.

Writ of error to Circuit Court of Coosa.

CLAIM of property interposed, under the statute, by Thomas T. Wilkins as trustee of Ann T. Wilkins, to a slave levied on by the sheriff of Coosa, by virtue of an execution, at the suit of the Bank, against the goods, chattels, &c., of Thomas G. Wilkins, Thomas T. Wilkins, and William L. A. McLeray. An issue was made up between the parties, and at the trial, the claimant, to support his claim as trustee, gave in evidence a deed executed by himself, in the year 1834, in the State of Georgia; which deed recites, "that forasmuch as a marriage ceremony had recently been had, joining together in the holy bands of wedlock, the said Thomas T. Wilkins and Ann Lowe, whereby she has become the wedded wife of Thomas T. Wilkins, and whereby the said Thomas T. Wilkins has acquired by marital right, a considerable estate, consisting of land and negroes, lately the property of the said Ann T. Lowe. Now, in consideration of the sum of five dollars by Eli E. Gaither to the said Thomas T. Wilkins, paid, &c., the said Wilkins bargained, sold, and conveyed, to the said Gaither, as a trustee, for the purposes and uses hereinafter set forth and specified, all the lands and negroes formerly belonging to his said wife, the said Ann T., and now belonging to him in right aforesaid, as well as all his, or her interest, derived as aforesaid, in and to the lands and negroes of which she held and claimed an undivided share, jointly with her brother, William J. Lowe; and forasmuch as her part, now his, cannot now be identified by name, age, or sex, as to the negroes; or by quality, quantity, metes or bounds, as to the lands, it is hereby specified and declared, that the same shall and may be herein inserted, for the purposes of future identification, reference being had to the division hereafter to take place, between the said Thomas T., in right of his said spouse, the said Ann T. and the said William Lowe."

The uses and purposes are thus declared: "To have and to hold, &c., for the joint benefit, use and behoof, of the said Thomas T. and Ann T., during their joint lives; and afterwards, to the use, benefit and behoof of the survivor and their children, issue of the said marriage: and in case of the death of either leaving no issue, or possibility of issue, of theirs,

children of the said Thomas T. by the said Ann T., then to the proper and only use, benefit and behoof of the survivor of them, and to his or her heirs forever. And it is hereby set forth, declared, stipulated, and confirmed by and between the said parties, First—That the possession and occupancy of the said property, shall be and remain with the said Thomas T. Secondly—That the said Thomas T. shall, and may receive, and control the rents, issues and profits thereof, to himself and family, during the coverture or marriage, in such manner, consistent with the premises, as may be best. Thirdly —In case the said parties shall agree upon the propriety or expediency of selling, or conveying any portion, or part of the said property, the same may be done by the said trustee, he applying the proceeds to the purchase of other property, to be settled to like uses. Fourthly—The said Thomas T. doth relinquish and release, to the said trustee, all right or power to sell, alien, or convey any part, or all of the said property, except for the purpose, and in manner aforesaid."

It was in proof, that Gaither resigned as trustee in 1839, and that the claimant was then appointed trustee by order of the Court of Chancery for Putnam county, Georgia. Also, that the slave levied on was one of the slaves mentioned in, and sought to be conveyed by the trust deed.

The cause was put, by the parties, to the jury alone, on the force and effect to be given to the deed of trust—the claimant contending, that it protected the property from sale for his individual debts; and the plaintiff insisting, there was nothing in its terms to forbid the property being sold under execution for Wilkins' debts.

The Court charged the jury, that the law arising on the deed was with the defendant.

To this the plaintiff excepted, and the charge is assigned as error.

Morris, for the plaintiff in error, cited Harkins v. Coulter, 2 Porter, 463; Nelson, Carleton & Co. v. Banks, June Term, 1844,

No counsel appeared for the defendant.

GOLDTHWAITE, J.—The decision of the Circuit Court, sustaining the title of the claimant to the slave in controversy,

may have been made with relation to the quantity of interest which the defendant in execution had under the deed; or it may have been made with reference to the distinction between an equitable and a legal estate. We shall consider the cause in both aspects.

There is nothing upon the deed itself to induce the conclusion, that the husband either intended to convey, or supposed he was actually conveying, an estate in trust for the separate use of his wife. The deed recites, that a marriage had recently been solemnized, and that by it in right of his wife, he had been invested with a right to certain real and personal estates. Its object was, to settle these estates in a manner different from that in which the law had already disposed of them. In other words, he wished to make a marriage settlement, and to effect this purpose, he conveys his interest to a named trustee, who is thereby invested with the legal title, but subject to certain uses declared by the deed. Instead of retaining the absolute estate in himself, he declares it shall be a joint estate to himself and wife, with remainder to the survivor for life, and a further remainder in fee to the issue of the marriage. If the intention was to create a separate estate to the wife, or even an estate for their joint maintenance during their lives, it was as easy to have declared this intention as any other; but this was not the intention of the husband, as is evident from the first and second conditions imposed on the grant in which he stipulates, not only that he shall remain in possession of the estates, but that he shall receive and control the rents and profits. It would be strange indeed, as is remarked by this Court in Harkins v. Coulter, 2 Porter, 463, if such terms could be construed to mean, a separate estate in the wife.

We are aware that the Court of Appeals of Virginia in two cases, have held, that slaves settled to the joint use of the husband and wife during coverture, with remainder for life to the survivor cannot be reached by a creditor. [Scott v. Gibbon, 5 Mum. 86; Roanes v. Archer, 4 Leigh. 550.] But the first of these cases received a very slight consideration on this point, and the last is put upon the previous decision without any consideration whatever. We are all aware how firmly even an erroneous principle becomes fixed by decision, when it enters into the legal assurances of the property of a State. In

our own State a different result was arrived at in the case of Harkins v. Coulter, before cited, which would greatly influence us, even if our own judgment did not concur, though the case here differs from that, inasmuch as here the husband is the grantor. We are clear in the opinion, that the husband must be considered as entitled to a life interest in the slave under the deed. What will be the interest of his wife or children, if they survive him, we need not now consider.

The other view of the case is settled by the decision at the last Term, in the case of Nelson, Carleton & Co. v. Banks, where a similar interest conveyed to a trustee for the use of a lady, who afterwards married, was held to be liable at law to an execution against the husband. I dissented, in that case from a majority of the Court, on the ground, that the wife had only an equitable estate in the slave, which would be protected in equity against an insolvent husband or his creditors; but I concurred very fully in the opinion, that if the estate could be subjected in equity, there was no reason why a creditor might not attain the same result at law. In this case, conceding the legal estate to be in the trustee, the creditor could, in a Court of Equity, subject it to his debts; therefore, I concur here, that such may be the result of a levy.

The consequence of what we have said is, the reversal of the judgment, and the remanding of the cause.

MOFFITT & WATSON v. THE BRANCH BANK OF MOBILE.

1. A judgment rendered against Elihu Moffitt, and John V. B. Watson, will not sustain a forthcoming bond, which recites a judgment against Elihu Moffitt, and an execution issued upon such a bond, will be quashed.

Error to the Circuit Court of Mobile County.

MOTION to quash a forthcoming bond, and execution issued thereon, because the bond does not describe the judgment and execution on which it was given, and because one of the defendants in the execution, was dead at the time it was issued.

The Court below overruled the motion, from which this writ is prosecuted.

CAMPBELL, for plaintiff in error, submitted the cause.

ORMOND, J.—Perhaps the difference between the amount of the judgment as rendered, and that recited in the forthcoming bond, might be reconciled by the addition of the interest, which had accrued when the bond was taken. But the variance between the recital of the defendants to the judgment in the forthcoming bond, and those in the judgment and execution, upon which it professes to be founded, is fatal to it, upon the authority of Richardson v. O'Neal, 5 Ala. Rep. 618. The judgment was rendered against Elihu Moffitt and John V. B. Watson. The forthcoming bond describes a judgment rendered against Elihu Moffitt. This discrepancy is so great that, we cannot say that it is the execution and judgment described in the bond, and it does not therefore appear that there was any authority for taking it. The Court should therefore have allowed the motion, and for that cause, without considering the other causes assigned for quashing the bond and execution, the judgment of the Court must be reversed and the cause remanded.

BRANCH BANK AT DECATUR v. LANIER.

1. The payee of a promissory note agreed with the principal maker to extend the time of payment, and received from him a substituted note, subscribed with his name and that of his surety; suit being brought upon the substitute, the surety denied the genuineness of his signature, and a verdict was returned in his favor. Afterwards the surety was sued upon the original note, and pleaded the statute of limitations, which it seems had run pending the first suit: *Held*, that the facts did not prevent the operation of the statute, there being nothing to show that the surety participated in, or connived at the forgery of his name after it was discovered.

Writ of error to the Circuit Court of Morgan.

THIS was a summary proceeding by notice and motion, at the suit of the plaintiff in error, to recover the amount of a promissory note made by the defendant as principal and two others, as his sureties, on the 22d February, 1837, for the payment to the plaintiff of the sum of two thousand dollars, ninety days after date. The defendant pleaded several pleas, one of which was the statute of limitations; to this latter plea the plaintiff replied in due form, that the note sued on, was the sole and entire consideration of an extended note for nine hundred and fifty-four dollars and seventy-five cents, dated the 27th of September, 1837, and purporting on its face to be made by the defendant as principal, with the same sureties as subscribed the first note, payable, as provided by the act of 1837, entitled "an act to extend the time of indebtedness to the Bank of the State of Alabama and its Branches, and legalizing the suspension of specie payments and for other purposes;" which note was discounted by the plaintiff, in extension of the note now in suit, on the 11th of October, 1837, under the belief that the signature thereto, purporting to be that of the defendant was genuine. It is then alledged that suit was brought on the latter note, and verdict and judgment rendered in favor of the defendant, on the plea of *non est factum;* and that on the

2d November, 1843, and within one year after the determination of that suit, whereby, and not until then, the fraud in the execution of the extension note was made known, the plaintiff commenced the present suit on the original note.

There was a demurrer to this replication, which was sustained, and the plaintiff declining to reply further, a judgment was rendered in favor of defendant.

L. P. Walker, for the plaintiff in error, made the following points: 1. The defendant's liability was not merged in the extension note, because he was not a party to it, and is consequently suable on the original note. [2 Porter's Rep. 411; 11 Johns. Rep. 409; 15 Id. 241.] 2. In analogy to the statute which authorizes a plaintiff to bring another action within one year after his judgment has been reversed or arrested, the statute of limitations did not begin to run against the plaintiff until the expiration of that period, after the judgment in favor of the defendant, upon the extended note. [Clay's Dig. 328, § 86.] The extension note was a fraud upon the plaintiff, and a reasonable time, at least, should be allowed to sue upon the original note, after the fraud was discovered. *Further*, the statute of limitations was suspended upon the original until the extended note was ascertained, by the verdict and judgment, to be a forgery, as to the defendant. [3 Porter's Rep. 395; 14 Mass. Rep. 425; 3 Pick. Rep. 261; 4 Id. 283.]

S. Parsons, for the defendant.

COLLIER, C. J.—The mere fact of substituting a note, forged as to one of the supposed makers, for one which was genuine, and made by all who purport to have subscribed the former, will not, of itself, amount to a payment of the original note. Whether, if the party whose name was forged, was ignorant of the fact, and was a surety, and upon the supposition that his liability was discharged, omitted to take steps to hasten the payment of the debt, or for his own indemnification, he might not avail himself of these facts as a defence, we need not inquire.

Assuming that the substituted note was ineffectual for the purpose stated, and we think it clear that it cannot prevent the operation of the statute of limitations upon the first note,

in favor of the defendant, in the present case. This proposition cannot be better illustrated than by a statement of the facts. The defendant, with two others, made a note, on the 22d of February, 1837, for the payment of a sum of money to the plaintiff, ninety days after date; for the purpose of getting time to pay this note, another is offered to, and accepted by, the plaintiff, with the name of the defendant and the two other persons as makers. But the latter note, as it respects the defendant, is admitted to be a forgery. The statute began to run from the time the first note matured, and as the defendant did nothing to arrest its course, it continued until the bar became complete. To hold otherwise, would be to determine that a defendant might be affected by the act of a third person, to which he was not a party, and that he might be thus deprived of a defence which was provided by statute.

The plaintiff's counsel has attempted to bring this case within the statute, which authorizes a party to bring a suit within twelve months after a judgment obtained by him has been arrested or reversed, although the act which prescribes a limitation to the right to sue, perfected a bar after the first action was commenced. That statute applies where the plaintiff recovered a verdict or judgment, and not where the defendant made good his defence before the jury; consequently it cannot, by the application of the most liberal rules of construction, be invoked to aid the plaintiff. The case of Cummins v. Colgin, 3 Porter's Rep. 393, which has been cited to sustain the argument upon this point, instead of being favorable, is rather adverse to the plaintiff.

The consequence is, that the judgment must be affirmed.

NEWHOUSE & CO. v. REDWOOD, ADMINISTRATOR OF GOODWIN.

1. In an action of assumpsit against an administrator *de bonis non*, an offer by the administrator in chief to pay the principal sum sued for, in notes of third persons, is proper evidence to be left to the jury; the question upon such proof is, whether by this offer, the party was to be understood as admitting the debt sued for, to be then a valid and subsisting debt, which he was liable and willing to pay; or whether the offer to pay in notes was intended as a qualification of his liability, and as the condition upon which alone he was willing to pay.

Writ of error to the County Court of Mobile County.

Assumpsit by Newhouse & Co. against Redwood, as the administrator *de bonis non* of Goodwin, on the common counts. The defendant, with other pleas, pleaded the statute of limitations, and to this the plaintiff replied, that one Wm. S. Paine, the administrator in chief, had, within three years next before the commencement of the suit, promised, &c.

At the trial, the proof was, that Paine was appointed administrator in chief on the 11th January, 1841. In the year 1842, and during the time he was administrator, Paine offered the plaintiffs to pay them the principal of the debt sued for, in notes on third persons, which offer the plaintiffs refused to accept. The Court charged the jury, that such offer and refusal could not take the case out of the statute of limitations; but that the statute, notwithstanding such offer and refusal, was a bar to the plaintiffs' action.

The plaintiffs excepted to this charge, and now assign it as error.

Campbell, for the plaintiffs in error, insisted that the charge was too broad, inasmuch as it took from the jury the consideration of the question, whether this offer was an absolute recognition of the debt, coupled with a promise to pay in a particular manner; or, whether it was understood by Paine as a conditional promise. He cited, 4 Pick. 110; 22 Pick. 292; 2

Mitc. 168; 21 Pick. 123; 21 Maine, 433; 15 John. 511; 5 Wend. 257; 3 Wend. 189: 15 Wend. 284; 17 Wend. 514; 4 Porter, 223; Dodson v. Mackey, 4 N. & M. 327.

DARGAN, contra, argued that the law was now well settled, that a promise must be absolute and unconditional, to take a case out of the statute, when the statute has fully run, and the bar is complete. [Morrison v. Bell, 1 Pet. 351; 13 John. 288; 6 N. H. 132; 4 N. H. 315; Crawford v. Childress, ex. 1 Ala. Rep. N. S. 482] The offer, in this case, has nothing in it to be left to the jury; if this alone was before to the jury, the charge must be construed with reference to the inferences which the jury could draw from this alone, unattended with other circumstances, which, if they exist, should have been shown.

GOLDTHWAITE, J.—The bill of exceptions presents the single question, whether an offer, by a former personal representative of the intestate, to pay the principal of the debt, subsequently sued for against the administrator *de bonis non*, in notes on third persons, which offer the plaintiffs refused to accept, could take the case out of the statute of limitations. The Court charged that the statute was a bar, notwithstanding such offer and refusal. The plaintiffs contend here, that this evidence should have been left to the jury, to consider its effect, and that the result of the charge was to preclude such consideration.

It is difficult to say in what cases of this kind, the effect of the evidence is to be determined by the Court, without the aid of a jury, yet it is certain that it may be done under peculiar circumstances. Thus in Bell v. Morrison, 1 Peters, 351, the question directly before the Court was, whether or not the evidence given at the trial in that case, should have been left to the jury. So, too, in Bell v. Rowland, Hardin, 301, the question was the same, and the Court held, that it was proper either to submit the facts to the jury, or, (as was done in that case,) for the Court to determine, that taking the whole evidence of the plaintiff to be true, it would not warrant a verdict in his favor. Both these cases, however, very satisfactorily establish, that the evidence of the acknowledgment, or promise, may be of such a nature as to require the jury to pass upon its

effect. Thus it is said in the latter case, "if the slightest acknowledgment, if strained constructive acknowledgments and promises are held sufficient, it must multiply litigation, produce endless uncertainty, and, it is to be feared, a fruitful crop of perjuries. Slight circumstances, and a man's loose expressions, would be construed into a full acknowledgment of the debt, which he himself never intended to make, nor understood himself as making any acknowledgment at all. The only safe rule that can be adopted, capable of any reasonable certainty, is, that in order to take the case out of the statute of limitations, an *express* acknowledgment of the debt, as a debt due at the time, coupled with the original consideration; or an *express* promise to pay it, must be proved to have been made, within the time prescribed by the statute." In the former case, the Court says, "if there be no express promise, but a promise is to be raised by implication of law, from the acknowledgment of the party, such acknowledgment ought to be certain, an unqualified and direct admission of a previous subsisting debt, which the party is liable and willing to pay." This condition of the proof is evidently put as one proper to go to the jury, and from which they will be authorized to imply a new promise. The Court then proceeds thus: "If there be accompanying circumstances which repel the presumption of a promise or intention to pay; if the expressions be equivocal, vague, and indeterminate, tending to no certain conclusion, but at best to probable inferences, which may affect different minds in different ways, we think they ought not to go to the jury as evidence of a new promise to revive the cause of action."

In the present case, it was not shown that any circumstances accompanied the offer made by the previous administrator, to repel the presumption which might naturally arise from it; the expressions used are neither vague, equivocal or indeterminate. On the contrary, they seem to contain an unqualified and direct admission of a previous subsisting debt, which the party was liable to pay, and then willing to do so in a particular manner. At least such would be the inference which might be drawn from such an offer, and as we should be constrained to draw, if the same matter was submitted on a demurrer to evidence. We are not, however, to be understood that a jury would be *bound* to draw such an inference. The question to

be determined by them, would be, whether the party, by this offer, was to be understood as admitting the debt sued for, at that time, a valid and subsisting debt, which the party was liable and willing to pay; or, on the other hand, whether the offer to pay in notes of third persons, was understood by him as a qualification of his liability, and as the condition upon which alone he was willing to pay. And the jury should have been instructed, that if they came to the first conclusion, they might infer a promise to pay the debt, which would thus be withdrawn from the statute; but that its bar remained if they considered the offer to be conditional only. [St. John v. Garrow, 4 Porter, 223; Lucas v. Thorington, 5 Ala. Rep. 504.]

The case of Dodson v. Mackay, 4 Nev. & Mann. 327, is a direct authority, that in a case where the evidence will admit of more interpretations than one, it is properly left to a jury.

On the whole, we are satisfied that the charge of the County Court was too broad in assuming that such an offer and refusal could not take the case out of the statute. What the charge should have been, has already been indicated.

Judgment reversed and cause remanded.

DEAN v. MASSEY.

1. An attachment sued out, and levied, returnable into the Circuit Court, is the commencement of a suit, and may be pleaded in abatement, to another suit, upon the same debt, though after the levy the papers are destroyed by the directions of the plaintiff, upon the supposition, that it was informally, or irregularly sued out.

Writ of error to the Circuit Court of Benton County.

Debt on a sealed note, commenced by attachment, by the plaintiff against the defendant in error. The defendant pleaded in abatement, the pendency of a former suit, commenced also by attachment, against him by the plaintiff for the same cause of action.

The plaintiff replied, *nul tiel record.*

The defendant rejoined, that after the commencement of this suit, the writ of attachment, and proceeding mentioned in his plea, were destroyed by authority of the plaintiff.

The plaintiff surrejoined, admitting that the writ of attachment, and the proceedings were destroyed, after the commencement of this suit, but denied that it was by his authority; and again denied, that there was at the time of the filing of the plea, and of the issuance of the attachment, any such former suit, for and in respect of the debt here sued for, &c.

Upon this surrejoinder, the defendant took issue.

Upon the trial, the defendant proved, as appears by a bill of exceptions taken at the trial, by the justice of the peace, who issued the attachment in the cause, that a few days before it was issued, he had, at the instance of the plaintiff, issued an attachment in his favor, which, to the best of his recollection, was for the same cause of action. That the first writ, was given to the plaintiff—that a few days after it was returned by the plaintiff, who said, he was advised by counsel, that it was defective, and should be destroyed; before the second was issued, witness burned the first attachment, affidavit, &c.

The plaintiff's counsel objected to the witness stating, that to the best of his recollection, the two attachments were for the same cause of action. The Court overruled the objection. The defendant introduced evidence, tending to prove, the levy of the first attachment by the sheriff, and that it was returned to the justice.

The Court instructed the jury, that if they believed, from the testimony, the plaintiff had, before the writ of attachment in this case was sued out, sued out a previous attachment for the same cause of action against the defendant, and that the same had been levied by the sheriff, on the defendant's property, and that the same had been destroyed by his directions, they must find for the defendant. To which the plaintiff excepted, and moved the Court to charge, that if the first was

not returned to Court, but was destroyed, before the term of Court to which it was returnable, they must find for the plaintiff, which instruction the Court refused to give, and to which the plaintiff excepted.

In the record is filed another bill of exceptions, styled, "second, and additional bill of exceptions." From which, it appears, that on the trial of the cause, the justice of the peace who issued the attachment, when testifying of his recollection of the identity of the cause of action in this, and the former attachment between the same parties, stated on his cross examination, that there was no declaration or bill of particulars attached to the first attachment papers, and no other written description of the cause of action than such as is set forth in the affidavit, bond, and attachment in this cause; which was all the proof of the written description of the cause of action set forth in the first attachment; whereupon the plaintiff's counsel moved the Court to instruct the jury, that if they believed, from the testimony, that the first attachment papers contained no other cause of action than such as above set forth, they must find the issue for the plaintiff, which the Court refused, and instructed the jury, as set forth in the first bill of exceptions; to all which the plaintiff excepted, and prayed that it be made part of the record, which is done.

[Signed,] DANIEL COLEMAN, [SEAL.]
26th Nov., 1844.

The cause of action set out in the affidavit, and attachment, is, that the defendant is indebted to the plaintiff in the sum of sixty-five dollars, fifty-seven cents now due.

Judgment being rendered for the defendant the plaintiff prosecutes this writ, and assigns for error the matters of law, arising out of the bill of exceptions.

POPE, for the plaintiff in error.

S F. RICE, contra, contended, that the only matter in issue before the jury, was, by whose authority the first attachment papers were destroyed—all the other facts were confessed by the pleadings, and this being an immaterial issue, the defendant would have been entitled to a judgment *non obstante*, upon the admission upon the record.

The suing out of the attachment, and levy, by the sheriff, was the commencement of a suit, which could only be terminated by the judgment of the Court, or by giving six days notice in vacation. [Clay's Dig. 325, § 73.]

There is no error shown in the bills of exceptions, and it will be seen on examination, that the evidence of the justice of the peace, related to a matter admitted on the pleadings—the identity of the cause of action in both suits.

As to the necessity of indorsing the cause of action, and its effect, he cited 6 Ala. Rep. 348, 373; 1 Id. 433; 4 Id. 57; 5 Id. 182.

He objected to the second bill of exceptions, as a part of the record. Its date shows that it was taken after the adjournment of Court, without notice to the adverse counsel.

ORMOND, J.—Although the pleadings in this case, were spun out to an unnecessary length, and irrelevant matter was introduced, we think it is in substance, an issue upon the plea, and as no demurrer was interposed, no question arises upon the regularity of the pleadings.

We think it entirely clear, that an attachment sued out, and levied, returnable into the Circuit Court, is the commencement of a suit, and that it is not competent for one of the parties, by the destruction of the papers, to put an end to it. The papers should have been sent to the Court, to which the writ was returnable, and there disposed of. Any other course, might, in its consequences, lead to the grossest abuses.

We can see no error, either in the testimony admitted, or in the charge of the Court. The question to be established, was, whether the two writs of attachment, were sued out on the same cause of action. The statement of the debt in the affidavit, being the same in both, was *prima facie* evidence that they were sued out on the same demand, unless the contrary was shown; and certainly, there was no impropriety in permitting the justice to swear, to the best of his recollection and belief.

Let the judgment be affirmed.

LUCAS v. THORINGTON'S ADM'R.

1. The statute of limitations will not run, so as to take from a plaintiff the benefit of a *payment* made to the defendant—there being mutual accounts between them. The statute applies only to causes of action, and then only after the right to sue has accrued.
2. *Semble*—the mere form in which a party's account is stated, should not be allowed to prejudice his rights; especially where it appears to have been made out without a regard to mercantile form.

Writ of error to the Circuit Court of Montgomery.

THE intestate of the defendant in error declared against the plaintiff in *indebitatus assumpsit*. The declaration embraced all the common counts, and the cause was tried on issues joined upon the pleas of non assumpsit, payment, set off, and statute of limitations.

Certain questions of law were reserved on the trial, at the instance of the defendant. It is shown by the bill of exceptions that the intestate's account against the defendant amounted to fifteen hundred and ninety-four 20-100 dollars; in which was embraced one item for "cash paid Bynum, $520 20." At the foot of this account is the following, viz; "I admit the correctness of the within account, with the exception of the item of $520 paid William D. Bynum, upon an order, purporting to be drawn by me, which I do not admit. March 31, 1838. HENRY LUCAS." The defendant's account against the intestate amounted to eleven hundred and two 59-100 dollars; which is admitted as follows: "The above account is correct, and I agree to allow it against my account on settlement. March 31, 1838. J. H. THORINGTON." In the defendant's account is an item charged as follows: "To cash placed in your hands to purchase Copeland's judgment, $700."

Plaintiff then adduced an order in these words: "Mr. John H. Thorington: Dear Sir—You will please send by Mr. Bynum the amount of money I left with you. I would not call

for the whole amount at this time, if I had not $700 to raise in a few days. And oblige your friend, HENRY LUCAS.

Mount Meigs, May 15, 1828."

And, also, evidence tending to show that it was signed by an authorized agent of the defendant. On this order was indorsed a receipt, as follows: "Received of John H. Thorington, five hundred and twenty dollars, U. S. Bank notes, on the above order, May 18th, 1828. W. D. BYNUM, for H. Lucas." Bynum was then introduced as a witness for the plaintiff, who testified to the receipt of the money, as expressed in the receipt, and that he was the defendant's agent. Here the plaintiff closed his testimony, disavowing all right to recover the five hundred and twenty dollar item charged in the intestate's account, but insisting on it as a payment.

The defendant then offered George C. Ball as a witness, who testified, that at the time the admissions of the respective parties were made, they were at his office, for the purpose of adjusting their respective claims. At their request, he stated the accounts adduced by them, according to the directions which each gave, in respect to his demand. Witness, at that time, first read over the account of the defendant, item by item—all which were admitted by the intestate. He then read the account of the intestate, in the same manner, and the defendant admitted it, except the item for five hundred and twenty dollars paid Bynum—about which he required an explanation. The intestate then stated it was for money paid Bynum on a draft drawn by defendant. The latter positively denied ever having drawn, or authorized the order to be drawn, that he never had received the money, or heard of its having been received by any one; that he did not believe the order had any existence, and never would pay it. The defendant also demanded its production, but the intestate excused himself by saying he could not find it.

The Court charged the jury that they need not necessarily apply the plea of the statute of limitations to the plaintiff's demand; if they believed that the item of five hundred and twenty dollars, charged in the intestate's account, was a payment of a part of the seven hundred dollars charged in the defendant's account, the statute was inapplicable.

Thereupon the defendant's counsel prayed the Court to

charge the jury that the item of $520, paid to Bynum, in the account of the intestate against the defendant, being denied, and payment refused by the latter, is subject to the bar of the statute of limitations, and no recovery could be had thereon. *Further*, that the order on the defendant, even if drawn by him, or his agent, is also barred and no recovery could be had thereon; which charge was refused by the Court. And the jury were instructed, that if they believed the $520 item, which was withdrawn as a charge, was a payment of a particular sum deposited by the defendant with the plaintiff's intestate, the statute of limitations did not apply; that as the intestate could at no time, (if the case supposed existed,) have maintained an action on the order for the money paid to Bynum, such a defence could not avail to take away the right to be allowed it as a payment. If it was a charge against the defendant, the statute would operate against it.

The defendant's counsel further prayed the Court to charge the jury, that if they believed the draft purporting to be drawn by the defendant, on the intestate, was to be paid from a particular fund in the hands of the latter, yet it would not vary the case, and under the plea of the statute of limitations, the plaintiff could not recover the disputed item in the account, nor could he recover on the order.

A verdict was returned in favor of the plaintiff, for seven hundred and twenty-six 61-100 dollars, and judgment was rendered accordingly.

A. F. Hopkins, with whom was Geo. C. Ball, for the plaintiff in error, made the following points: 1. There was no acknowledgment by the defendant below, which would revive a cause of action against him for the disputed item of $520. [4 T. Rep. 211; Crawford, et al. v. Childress' ex'r, 1 Ala. Rep. N. S. 488; Lucas v. Thorington, 5 Ala. Rep. 504.] 2. The evidence does not show that the $520 was paid by intestate to the defendant's order, upon account of a particular sum deposited by the latter with the former; the charges of the Court upon this point, were calculated to withdraw the attention of the jury from the merits of the case, and are consequently erroneous.

J. Thorington, for the defendant in error, made several ob-

jections to the bill of exceptions, which are not regarded by the Court as essential to a decision of the merits of the case. He then insisted that the $520 item was shown to be a payment in part of the $700, which the defendant had previously deposited with the intestate. That the statute of limitations will not operate to deprive one of the benefit of a payment, but applies only to bar a right of action after it has accrued. [Clay's Dig. 326, § 78; Ang. on Lim. 181.] No cause of action ever accrued to the intestate, either upon the order, or for money advanced, &c. The case is now presented in an aspect very dissimilar from that it assumed at a previous term, (5 Ala. Rep. 504;) then the $520 was sought to be recovered of the defendant as a charge, and in that condition of the case, and no other, this Court held that the statute of limitations operated as a bar to its recovery.

COLLIER, C. J.—The only question raised when this cause was here at a previous term, was, whether the indorsement of the defendant on the plaintiff's account, was an admission that the excepted item of five hundred and twenty dollars was a proper charge, and a waiver of the statute upon the plaintiff's making proof of its correctness. We then held that there was nothing that amounted in law to such a promise; that so far from this being the case, the acknowledgment amounted to a protestation of the injustice of the demand, and a consequent unwillingness to pay it. The case is now presented in an aspect very different, and although our previous decision, so far as applicable, must be regarded as decisive, yet it cannot be held to exclude all evidence, except such as was offered upon the first trial, or to prevent either party from raising other legal questions applicable to the proof. To hold otherwise, might operate great injustice, more especially to the plaintiff below. On the first trial, the Court instructed the jury that the indorsements on the accounts, if proved, were sufficient to take the contested item out of the statute of limitations; and if the defendant was bound by the order, the statute should not apply to it, when it did not to the rest of the account. Here was a charge so favorable to the plaintiff, upon the law, that it was calculated to induce the belief he would, (as in truth he did,) obtain a verdict. Acting under this impression, his counsel

may have thought it most prudent not to ask an instruction touching the statute, if the five hundred and twenty dollars were regarded as a payment instead of the advance of money. But this question is now distinctly raised, both upon the evidence, and the charge of the Court, and its decision cannot be avoided.

It is admitted, or rather is not denied, by the defendant's counsel, that if the disputed item was a payment of a part of the seven hundred dollars, placed by the defendant in the intestate's hands, that it gave to the latter no right of action for its recovery. This is certainly the law, so long as their accounts remained unsettled. And in such case it is equally clear, that the statute of limitations could not so operate as to prevent the intestate from claiming the benefit of it on settlement. For the statute applies only to causes of action, and then only after the right to sue has accrued. This is a proposition so plain that it does not require the aid of authority to support it.

The manner in which the accounts of the parties appear to have been stated, by a mutual friend, does not conclusively bind the plaintiff to treat the disputed item as a charge against the defendant for money lent; but it may be considered, either as a loan, or a repayment, according as the facts may show it to be the one, or the other. The account of neither party seems to have been drawn with a particular regard to mercantile forms, and to hold either strictly bound by the terms in which their accounts have been stated, would be unreasonable, and cannot be allowed, where the ends of justice would be in any manner affected.

The ruling of the Circuit Court seems to us to have been authorized by the evidence, and is in conformity with the views we have expressed. The judgment is therefore affirmed.

THE STATE v. NELSON.

1. When the State demurs to the defendant's plea of *autrefois convict*, to an indictment for a capital felony, and the demurrer is overruled, this does not entitle the defendant to be discharged; nor is it irregular in such a case to permit the State to rejoin.
2. In an indictment for a capital felony the State and the defendant both announced themselves ready for trial; an issue was formed on the plea of the general issue, and a jury sworn and impanneled. There was also a demurrer to a plea of *autrefois convict*, which being overruled, the State was permitted to reply; the defendant rejoined and the State demurred. After this, the defendant was permitted to take issue on the replication, and to withdraw his rejoinder. At this stage of the proceedings the State was permitted to continue for want of testimony, relating to the issue last joined. The defendant objected, but the jury was discharged and dispersed. At the next term, the defendant was convicted; and moved these matters in arrest of judgment: *Held*, first—that an issue formed on a plea of *autrefois convict*, cannot be regularly submitted to the jury with the issue upon the plea of not guilty, but that the issues should be tried separately.

   Second—that the impanneling of the jury upon the plea of the general issue previous to disposing of the plea in bar, was an irregularity which could be obviated only by discharging the jury.
3. That such discharge under the circumstances of the case, was not equivalent to an acquittal, nor entitled the defendant to his discharge.

From the Circuit Court of Barbour, on questions reserved as novel and difficult.

The prisoner was indicted in Henry county for an assault, with intent to kill, committed on Williams. A change of venue was had to Barbour county, where, at the Spring Term, 1844, the proceedings were had, out of which the questions referred to this Court, arose.

It appears from the record, that the prisoner interposed a a plea of *autrefois convict*, and in this he sets out his former trial and conviction, upon an indictment for an assault, with intent to commit murder on one Williams, but in which indictment there is no allegation that Williams is a white person. The record shows also a demurrer in short by consent, and a

joinder in the same manner; but it does not show, that any judgment was given on this demurrer. After the entry of the demurrer, the State put in a replication to the plea of *autrefois convict*, which asserts that such proceedings were afterwards had upon the judgment given upon the indictment named in the plea, in the Supreme Court of this State, that such judgment was reversed, annulled, and held for naught. There is no formal issue joined on this replication, but the minutes of the Court then sets out, that "both parties announced themselves ready for trial, and after issue formed on defendant's plea of former conviction, and so soon as issue was formed thereon, the State moved for a continuance of the cause, and on sufficient showing," it was continued.

The presiding judge, however, signed a bill of exceptions, which states the proceedings had at the trial, in a manner somewhat different from that which is disclosed by the record. From this, it appears, that both parties announced themselves ready for trial; issue was formed on the plea of the general issue, and a jury impanneled and sworn. And there was a demurrer to the plea of *autrefois convict;* the demurrer was overruled, and the State permitted to reply. Upon this the counsel for the prisoner demanded his discharge; this the Court refused, but permitted the State to reply to the plea. The Court then decided, that the plea of *autrefois convict*, was to be decided by the Court, and not by the jury. At this stage of the proceedings, it being the afternoon of Saturday, the Court permitted the jury to disperse under the ordinary charge as to their duty; the counsel for the defendant refusing to assent, or dissent, to their dispersing. On the succeeding Monday morning the jury returned, and the trial was resumed. The defendant rejoined to the replication of the State, to his plea of *autrefois convict*, and the State demurred to the rejoinder; after this the defendant withdrew his rejoinder, and was permitted to take issue upon the State's replication.

At this stage of the proceedings, the Court permitted the State to continue for the want of testimony relating to the issue then last joined. This the defendant objected to, and demanded to be discharged. The Court allowed the jury to be discharged, and they dispersed, whereupon, the defendant again moved for his discharge, which was again refused.

The record further discloses, that the prisoner was tried, convicted, and sentenced upon the plea of not guilty at the Fall Term, 1844.

After verdict, he moved in arrest of judgment, the matters which had occurred at the preceding Term, and produced the bill of exceptions allowed, signed and sealed by the Judge who presided at the previous Term. The Court overruled the motion, but reserved the questions thereon arising, as novel and difficult.

Cochran argued, that when the jury was sworn, it was in point of law charged with the prisoner, and that the subsequent continuance and discharge was equivalent to an acquittal, he cited, The People v. Barrett, 2 Caines, 395; The State v. Ned, 7 Porter, 187.

The Attorney General for the State, contended—

1. That the prisoner cannot be heard to complain of the supposed irregularity, as the entire proceeding on the issue was for his benefit, and was only allowable *in favorem vitæ* after plea of not guilty. [Kinlock's case, Foster, 17; 2 Hale, 307.]

2. The rule, that a jury cannot be discharged when once charged with the prisoner, only obtains after evidence has been given. [4 Black. Com. 360; 2 Hale, 295; Ned v. State, 7 Porter, 204; People v. Goodwin, 18 John. 187; 6 S. & R. 577; 1 John. 66; 2 Gall, 364; 1 Chitty, C. L. 631; 9 Wheat. 579; 9 Mass. 494; 2 John. Ca. 307; 2 John. 275.]

GOLDTHWAITE, J.—Although it may admit of question, whether we are authorized to look into the bill of exceptions allowed at a different Term, from that in which the conviction was had, yet, as the case here has been chiefly argued on the facts therein disclosed, we shall consider the questions as if the same facts otherwise appeared on the record.

1. The first point which then arose was, whether the overruling of the demurrer interposed by the State to the defendant's plea of *autrefois convict*, was sufficient to warrant his discharge. This question, it is true, is not raised here, but in a case of this nature it is satisfactory, that every matter affecting the ultimate judgment should be considered.

There seems formerly to have prevailed, a notion, that a

criminal could be sentenced capitally for a mistake in pleading, but Hawkins very properly repudiates it, and shows that the demurrer does not conclude him from pleading over to the felony, either then or at any other time. [2 Hawk. 467, § 6.] The same author concludes, that the rule is otherwise in cases not capital. [Ib. § 7.] When it is considered, that anciently, and even now, that the pleadings in criminal cases may be *ore tenus*, (Chitty C. L. 460,) it will be evident, that a mere step in pleading cannot have the effect to prejudice either the prisoner or the State. We think the Court therefore, very properly refused to discharge the prisoner at this stage of the proceedings.

2. With respect to the main question, it is proper to ascertain the precise facts which occurred. It appears then, that both parties announced themselves ready for trial; that an issue was formed upon the plea of the general issue, and that a jury was sworn and impanneled. There was also a demurrer to the plea of *autrefois convict*, which being overruled, the State was permitted to reply. Afterwards, the defendant rejoined to the State's replication, and the State demurred to this rejoinder. After this, the defendant withdrew his rejoinder, and was permitted to take issue on the replication. At this stage of the cause, the State was permitted to continue for the want of testimony relating to the issue last joined. The defendant objected to this, and demanded to be discharged.

From this statement, it will be seen, that a very loose, not to say irregular course of proceeding, was pursued. It seems to have been assumed, that the issue growing out of the plea of *autrefois convict*, was to be submitted to the jury at the same time as the proof of the crime. All such issues, however, are collateral, and though they may be tried by the jury summoned to pass on the trial in chief, yet it is exceedingly irregular to submit them in connection with the inquiry, as to the guilt or innocence of the accused. [2 Hale, 255.] In case of felony, says Mr. Chitty, if the plea be held bad, the judgment is *respondeat ouster*, or rather, as the defendant generally pleads over to the felony, the jury are charged again, and that at the same time with the issue on the plea of *autrefois acquit*, to inquire of the second issue, and the trial proceeds as if no plea in bar had been pleaded. [Chitty's C. L. 460.] If

this author intended himself to be understood as asserting, that both issues may at the same time be submitted to the same jury, he is certainly mistaken, and the cases cited by him lend no countenance to such doctrine. On the contrary, in Capt. Roche's case, Leach, 138, where the defendant had pleaded *autrefois acquit*, and not guilty, the Court said, that putting both issues to the jury at once, would lead to the absurdity, that the jury would be obliged to find upon both; and yet if their first finding was for the prisoner, they could not go on to the second, because the first finding would be a bar. They are distinct issues, and the jury must be separately charged with them.

3. The whole difficulty in this case, is, that the jury was prematurely sworn and irregularly impanneled; as their could be no trial in chief, until the collateral issue or plea in bar was disposed of in some way. It is true, the prisoner might have waived the collateral issue, and then have had a trial of the one in chief; but the Court could not compel him to do so. The question then may be said to be varied in a very material point, and comes to no more than this, to wit: whether the Court, after falling into an irregularity, was bound to pursue it, and allow a trial upon an issue not formed when the jury was sworn.

If the question really was, that the jury had been discharged because the prosecuting officer was not prepared to proceed with the trial, we should entertain very serious doubts of the power of a Court to discharge a jury for that cause only; but it is a very different matter when, from the intervention of some irregularity in the proceedings, either a jury has been improperly impanneled, or an improper juror sworn. It is very difficult to draw a distinction between the discharge of one juror when a full jury has been selected by the prisoner, with the substitution of another against his will, and the discharge of the entire pannel after being sworn, but before any evidence offered. The case of Williams, 3 Stewart, 454, goes to this extent. There the Circuit Judge having ascertained, that one of the sworn jurors, who had been accepted by the prisoner, was not a freeholder, discharged him after eleven others had been sworn, and the effect was to force another juror on the prisoner. This Court, however, held, that the

discharge was not equivalent to an acquittal, although the sentence was reversed for irregularity. In principle, this case goes the whole length of asserting, that the irregular discharge of a juror before evidence given, does not preclude a subsequent trial.

In the present case, the prisoner never was in legal jeopardy. If the trial had proceeded immediately after the impanneling of the jury, upon the only issue which then had been formed, the judgment, as a matter of course, would have either been arrested, or reversed, for the reason that the plea in bar was not disposed of. It would also have been erroneous, for the Court to have compelled him to withdraw that plea, or even to submit to terms as the case then stood. On the part of the State, it would have been exceedingly irregular to have gone into the trial of a collateral issue, formed subsequent to the plea of not guilty. The difficulty in which the proceedings had been involved, by the irregularity of swearing the jury, when the plea in bar was not disposed of, could only be obviated by discharging them, and we entertain no doubt of the power of the Court to do so, under the circumstances of this case.

Judgment affirmed.

CARROLL, ET AL. v. MOORE, ADM'R.

1. The sureties of an administrator, who has left the State, may appear and represent him on the final settlement, and will be entitled to reduce the decree, by the value of his services rendered as administrator.
2. No question can arise in this Court, as to the reasonableness of the compensation, unless made in the Orphans' Court.
3. An administrator, has who paid any of the distributees, may on proof of the fact, have satisfaction entered.
4. The Orphans' Court cannot decree, that the sureties, on satisfying the decree rendered, be discharged from further liability—that can only be ascertained, by a proceeding upon the bond itself, before a competent tribunal.

Error to the Orphans' Court of Sumter.

From the record it appears, that Moore was, on the 16th of June, 1841, appointed administrator of the estate of Jacob Carroll, and executed a bond with Michael Carroll, John Boyd and Emanuel M. Walker, as sureties, and took upon himself the administration of the estate.

On the 14th December, 1843, the Court revoked the letters of administration, upon the ground, that Moore had removed, without making settlement of his accounts, and appointed an administrator *de bonis non.*

At March term, 1844, the record recites, that publication had been made, requiring Moore to file his accounts, and that his sureties appeared and filed an account current, and vouchers, for a final settlement, and the 24th May, 1844, set for final settlement, and publication ordered.

Upon the 24th May, the Court proceeded to hear exceptions to the accounts, and made a final decree, charging Moore with $17,627 48, and allowed him for slaves divided, $9,675, for services, $1,327 05, for insolvencies, uncollected claims, &c. $14,230 44, and decreed $3,397 04, for distribution between the distributees, six in number, being $666 17 to each, for which a decree was rendered, and the sureties discharged from further liability, on paying the amount decreed.

The sureties also produced conveyances from two of the distributees, Michael H. Carroll and George W. Smith, of their interest in said estate, which conveyances had been duly proved and recorded, and the Court decreed, that the administrator be allowed to retain in his hands, the amount decreed to such distributees respectively.

From this decree, a writ is now prosecuted, and errors assigned:

1. The Court erred in proceeding to a final settlement, upon an account stated by the sureties.

2. In awarding the distributive share of Michael Carroll to the administrator.

3. In allowing commissions to Moore, when he had left the State.

4. In discharging the sureties from further liability.

Lyon, for plaintiff in error, cited 4 Paige, 102; 7 Id. 112; 1

Dev. Eq. 269; 4 Dess. 369; 3 Camp. 451; 3 Taunton, 32; 1 Starkie, 113; 3 Id. 161.

HOPKINS and W. R. SMITH, contra, cited 4 Ala. Rep. 521, 572; 2 Lomax, 328; 6 Leigh, 277; 9 Port. 667; 2 Ala. Rep. 195; 1 Id. 597; 7 Porter, 275.

ORMOND, J.—By the act of 1843, (Clay's Dig. 230, § 47,) the Judge of the Orphans' Court is required to state an account from the best information in his power, when an executor or administrator shall have removed beyond the jurisdiction of the Court. In this case, the administrator having removed beyond the State, and being cited for final settlement, his sureties appeared and filed an account, with the accompanying vouchers, which the Court received, and set a day for final settlement. The sureties of the administrator being responsible for his administration of the estate, had the right to represent him, in his absence, and the reception of the account stated by them, was an adoption of it by the Court. Nor could any one by possibility be prejudiced by it, as every item contained in the account was open for contestation, upon the final settlement by the distributees. It might indeed be questioned, whether this objection could be made here, after it was acquiesced in, in the Court below.

The established practice in this State, is, to allow executors and administrators a reasonable compensation for their trouble, which has been recognized by this Court, in Philips v. Thompson, 9 Porter, 667. It can make no difference, that in this case the administrator had removed from the State. It appears from the record, that previous to his removal, he had distributed the principal part of the estate, and his sureties were certainly entitled to the benefit of the compensation, to which he would have been entitled, in reduction of the amount for which a decree was finally rendered against them. Whether the allowance made was reasonable or not, we have not the means of determining, nor is the question, in this aspect, presented on the record, as no objection was made in the Court below.

The Court having rendered separate decrees, in favor of each of the distributees, made an order, that as to two of them, M. H. Carroll and G. W. Smith, the administrator be allowed to retain in his hands the amount decreed in their favor.

We think it cannot be doubted, that the administrator, on settlement of the estate, may prove that he has paid the amount due to a distributee, and have satisfaction entered upon the record. No conceivable benefit could be accomplished, by rendering a decree upon which an execution could issue in favor of a distributee, who had been paid off in full. Nor could any injury accrue by the entry of satisfaction, as the distributee to be affected by it, would be a party to the settlement, to controvert the fact. But in this case, there was no sufficient proof of the fact. The only evidence was the production of deeds, conveying the interest of the two distributees to the administrator, which the record recites, had been duly proved, and recorded. These were not such instruments as the law requires to be recorded, and the *ex parte* proof by the witnesses before the clerk, was no evidence of their execution; it was therefore error in the Court to act upon them, as proved, but should have required proof of their due execution.

The Court had no power to decree that the sureties of the administrator be discharged from further liability, upon payment of the decree then rendered against them. As it regards the matters embraced in, and litigated upon, in this settlement, doubtless the decree, if not reversed, and discharged, by the sureties, is a full protection to them. This immunity, does not depend upon the volition of the Orphans' Court, in discharging, or refusing to discharge, the sureties from liability, but by operation of law, from their having *pro tanto*, complied with the condition of their bond. The bond itself, was not a matter in litigation before the Court, and therefore the Court could make no decree affecting it. The bond will remain operative, as a security, until the conditions are all performed—the penalty of the bond is exhausted, or it is barred by the statute of limitations; and whether these defences, or any of them, exist, can only be ascertained by a competent tribunal, in a suit upon the bond itself. The action of the Orphans' Court, in this instance, is merely void.

Let the decree be reversed, so far as it authorizes the administrator to retain in his hands the amount decreed to M. H. Carroll and G. W. Smith, and the cause be remanded, to enable the administrator, if he thinks proper to do so, to prove the payment to them, of their distributive shares.

COBB v. CAGE.

1. A declaration by the sheriff that he levied an execution in favor of the plaintiff, on certain slaves who were present, in the possession of a trustee, for the purpose of being sold under a deed of trust; without attempting to take them into his possession, or otherwise control them, does not amount to such a divestiture of the authority of the trustee to sell the slaves, as will affect the title acquired by a purchaser under him.

Writ of error to the Circuit Court of Madison.

THIS was the trial of the right of property, pursuant to the statute. The facts are disclosed by a bill of exceptions, and are substantially as follows: The plaintiff in execution recovered a judgment against Benjamin Huggins, in the County Court of Madison, on the 15th February, 1841, for $185 11, besides costs; an *alias fi. fa.* was issued thereupon, on the 23d of March, 1843, and placed in the sheriff's hands on the 24th of the same month. Huggins, by deed of trust, executed on the 30th November, 1840, conveyed two slaves, viz: Charity and Matilda, together with other property, to John Allison, to secure to the claimant the payment of $2,100, which the grantor was indebted to him. Of this sum, an instalment of $1,000, with interest, became due on the 1st day of January, 1842. The deed provided for the retention of the possession of the slaves, &c. by Huggins, until he made default in the payment of the first instalment of the debt, intended to be secured; when this occurred, the trustee, upon the request of the grantor, should sell the slaves, &c.

The default of Huggins was shown, and that the trustee advertised the property for sale, pursuant to the deed, on the 24th March, 1843. On that day, and a short time previous to the sale, the sheriff declared that he levied the execution on the slaves—they being present, but not taken into his possession. The trustee then, without having been divested of the possession of them, offered the slaves for sale, when they were bought by

the claimant, to whom they were delivered—it being known that they had been levied on.

On the first of May, 1843, the purchaser at the sale by the trustee interposed his claim to the slaves by making affidavit and giving bond, &c.

The Court charged the jury, that if they believed from the evidence, that the levy was made, as shown by the evidence, before the sale by the trustee, they must find the property liable to the execution.

S. Parsons, for the plaintiff in error. The verbal levy of the sheriff did not invest him with the possession, as against the trustee, who had the actual adverse possession, under which he sold the slaves. If it did, the subsequent sale by the trustee would not have been maintenance, but would have invested the purchaser with title subject to the execution. [Story on Bailm. § 135, (3d ed.) Bigelow v. Wilson, 1 Pick. Rep. 485.] The statement by the trustee, at the time of the sale, that the slaves had been levied on, was not a recognition of the regularity of the levy, but refers to what the sheriff had just said.

Conceding the validity of the levy, it was not necessary that the claimant's title should have been consummated previous thereto, to enable him to succeed in the present case. His title was complete before he interposed a claim, and the facts show that the defendant in execution had no interest that could be sold. He might have maintained detinue, and if so was entitled to the statutory remedy, which he adopted. [Clay's Dig. 213, § 62; 211, § 52.]

J. W. McClung, for the defendant in error.

COLLIER, C. J.—The mere announcement of the sheriff that he levied the execution, without any effort to acquire possession of the slaves was inoperative for all purposes. An officer must actually seize the goods on a *fieri facias* before he can sell; though it has been said that a seizure of a part in the name of the whole, is a good seizure of all. [5 Dane's Ab. 39.] A regular levy on the defendant's goods invests the officer with a special property in them, and he may have trespass or trover against any one who takes them away; for he is answerable to the plaintiff for their value, and the defendant is dis-

charged from the judgment, and all further execution, if the officer has seized goods to the amount of the debt, although he does not satisfy the plaintiff or has not returned the writ. [See also, Bingham on Judgment and Ex'ns, 243 to 248; 5 Dane's Ab. 18.]

It has been held, that, in order to make a valid levy on personal property, the sheriff must have it within his power and control, or at least within his view; and if, having it so, he makes a levy upon it, it will be good, if followed up afterwards, within a reasonable time, by his taking possession, in such manner as to apprise every body of the fact of its having been taken in execution. [3 Rawle's Rep. 405-6.] In the present case, the sheriff did nothing more than merely to state that he levied the execution of the plaintiff below, on the slaves in question. He did not take them into possession, nor can we infer from the bill of exceptions, that he attempted to exercise any control over them. Under these circumstances there was no such divestiture of the authority of the trustee to sell, as would in any manner affect the title acquired by the claimant as a purchaser.

But if the levy was valid, is it certain that the Circuit Judge did not claim for it a potency, to which it is not entitled? There can be no question that the interest of a grantor in possession of property covered by deed of trust, may, before the time when the trustee is authorized to take possession of, or sell, it, to execute the purposes of the deed, be sold under a *fieri facias*. But after this time has arrived, the right to the immediate possession, authorizes the trustee to assert his legal title against the creditors of the grantor, whose executions may be levied upon the trust property.

In Magee v. Carpenter, 4 Ala. Rep. 469, it was decided that the interest of a mortgagor in possession, might, before default, be sold under a *fieri facias* against him; but if the mortgage, after that event, conferred upon the mortgagee an immediate right of possession, he had a legal title which he could assert against the creditors of the mortgagor, at whose instance the property had been seized. In the P. & M. of Mobile v. Willis & Co. 5 Ala. Rep. 770, this Court declared the law in no equivocal terms, and held that a claim of property was, in such a case, rightly interposed by the mortgagee. [See, also,

Davidson & Stringfellow v. Shipman, et al. 6 Ala. Rep. 27.] There is no difference in principle between the case of a trustee and mortgagee; if they are entitled to immediate possession, each may assert his claim.

If a trustee may become a claimant under the statute, against an execution creditor of the grantor, will the levy so divest his powers under the deed, as to make a sale by him, afterwards, inoperative? In Bigelow v. Wilson, 1 Pick. Rep. 492, it is said, that an attachment of property does not change the estate of the debtor, or take away his power of alienation; it gave only a lien, and the debtor might legally convey the property, subject to the lien. This lien the purchaser might discharge by payment of the debt before execution executed, or he might afterwards redeem the estate, if it were by law redeemable. If the debtor might, after levy, alienate the property, why may not a trustee on whom he previously conferred the power of sale, for the benefit of a creditor, dispose of it as the deed directs? If such a disposition would be legal, should not the purchaser be permitted to interpose his claim of right? But it is unnecessary to consider this question further, as our conclusion upon the first point is decisive of the case.

The judgment of the Circuit Court is reversed, and the cause remanded.

KIRKSEY v. JONES.

1. Under the attachment law an action on the case may be sustained either for wrongfully or vexatiously suing out an attachment; and the existence of malice is important only in connection with the amount of damages.
2. Where an attachment is wrongfully sued out, the defendant, whose goods are attached, may recover the damages actually sustained by reason of the levy; and if the process is vexatious as well as wrongful, he may recover as in an action for a malicious prosecution.

3. An averment that the attachment was sued out without any reasonable or probable cause, and for the purpose of vexing or harassing the party, is equivalent to the assertion that it was wrongfully and vexatiously sued out.
4. There is no distinction, as to the time when, a suit may be instituted for the abuse of the process between original and ancillary attachments.
5. An attorney at law intrusted with a note for collection by suit, is authorized to sue out the process of attachment; and his client is liable for the actual damage sustained, if the process is wrongfully sued out, although he may have instructed his attorney to use proper means only.
6. The client is only liable to the same extent, if the attorney acts maliciously as well as wrongfully.
7. It is a full defence to an action for wrongfully and vexatiously suing out process of attachment if any one of the causes which warrant that process actually existed, when it was sued out, although another and different cause is set out in the affidavit.
8. When the charge excepted to is affirmative, and given by the Court of its own motion, or at the instance of the other party, it is unnecessary to set out the evidence on which the charge is founded.

Error to the Circuit Court of Talladega.

Action on the case by Jones against Kirksey, for suing out an attachment, ancillary to a suit previously commenced, without any reasonable or probable cause, but for the purpose of vexing and harassing the plaintiff. There is no express averment in the declaration, that the attachment was wrongfully, vexatiously, or maliciously sued out. The defendant demurred. The demurrer was overruled.

At the trial, upon the issue of not guilty, it was shown that an ancillary attachment was issued at the suit of Kirksey, upon an affidavit made by one McAfee as his attorney, that Jones was about to dispose of his property fraudulently, with intent to avoid the payment of the debt sued for. There was also proof conducing to show, that before the attachment was sued out, the defendant put the note, on which the suit and attachment was founded, in the hands of McAfee, an attorney, for collection, and then instructed him to watch, and to take all proper means for its collection; and that the attachment was sued out, after commencement of an ordinary suit, and ancillary thereto, without the knowledge of the defendant. There was evidence conducing to prove, that after the suing out of the attachment, the defendant had information, that it was sued out by his attorney, and ratified what had been done.

The defendant moved the Court to instruct the jury, that if the defendant put the note in the hands of the attorney for collection, and instructed him to watch, and take all proper means for its collection, and that the attorney afterwards sued out the attachment, without the knowledge of the defendant, then the jury should find for the defendant. This was refused, and the Court charged, that to sustain the action, it was necessary to show, that the attachment was sued out without probable ground, and with malice; that if, after the attachment was sued out, the defendant ratified the act of his attorney in suing it out, knowing, or believing that it had been sued out without probable cause, and with malice, then the jury should find for the plaintiff. This charge was not objected to, but the Court also instructed the jury, that if they believed the defendant had probable ground to suppose, at the time when the attachment was sued out, that the plaintiff was about to remove his property out of the State, with intent to avoid the payment of the debt upon which the attachment was founded, that did not warrant the suing out the attachment on the ground stated in the affidavit; but that it might be considered by the jury in mitigation of damages.

The defendant excepted to the refusal to give the charge requested, and also to the one last stated, as given to the jury.

The overruling the demurrer and the matters of the exception are now assigned as error.

S. F. Rice, for the plaintiff in error, made the following points:

1. The declaration is bad—1. Because it is not shown that the attachment suit was ended and determined. The statute which permits suits of this kind is confined to *original* attachments. [Clay's Dig. 61, § 32, 34.] 2. Because there is no averment, that the attachment was maliciously, or wrongfully sued out. The words, for the purpose of vexing, or harassing do not necessarily import, either wrong or malice; and the one or the other is essential. [2 Starkie Ev. 911, n. 2, 923, n. a.; 2 Southard, 330.] Whether an attachment is wrongful, is a conclusion of law from facts. [6 Ala. Rep. 169.]

2. The charge asked for should have been given, as the legal proposition which it asserts, cannot be denied. If it was

proper to explain it, to make the case turn upon the subsequent ratification of the act, this was no reason to refuse the charge, because the jury might doubt, or entirely reject the evidence of ratification. [2 Starkie Ev. 923, note d.; Sommer v. Watt, 4 S. & R. 19; Maynard v. Johnson, 4 Ala. Rep. 116.] Besides this, the refusal of the charge assumes the credibility of the evidence of ratification, which in itself is error. [Huff v. Cox, 6 Ala. Rep. 316; 3 Porter, 64.] Again, a *tort* is not capable of ratification.

3. The charge last given by the Court is liable to two objections: 1. It assumes, that if an attachment is sued out, and only one ground is stated in the affidavit, the party must be liable to an action if that ground cannot be sustained, though it may be shown that all the other statutory causes for suing it out then existed. [1 Stewart, 425.] 2. But the principal ground of exception is, that the charge excluded the consideration of the fact, that Jones was about to dispose of his property fraudulently, with intent to avoid the payment of the debt sued for; as the removal of his property after suit commenced with intent to avoid the payment, is a *fraudulent* disposition of his property. The removal of property out of the State, even with an honest intent, is good ground for an ancillary attachment, and such a removal with intent to avoid the payment of a debt sued for, is embraced in the ground given by statute, as about to dispose of his property fraudulently, with intent, &c. [Ware v. Todd, 1 Ala. Rep. 199.]

L. E. Parsons, Wm. P. Chilton and B. F. Porter, contra, argued—

1. The demurrer was properly sustained, as the right of action depends not upon any malicious motive, but upon the want of probable cause. In case for malicious prosecution malice will be inferred from the want of probable cause. [Starkie on Ev. 912.] The averment of malice is not essential in this action. [Wilson v. Outlaw, Minor, 367; Clay's Dig, 61, § 32; 1 B. & P. 205; 1 Peter's, 210.] It is the *result*, and not the *motive*, which here gives the right of action.

2. The process of attachment as ancillary to a suit formerly commenced, cannot differ in principle from original process; and although the statute speaks only of the latter, it arises out

of the subject matter, that the same rules should be applied to both classes of suits.

3. The act of the attorney was within the scope of his authority, and therefore, the principal is liable for his acts; but here the case shows a subsequent ratification, in addition to the original authority.

4. The charge given is correct, when it assumes, that the existence of one ground for suing out the attachment, was no excuse for assuming one that did not exist. [Johnson v. Hale, 3 S. & P. 331.] But this charge, for any thing stated, is entirely abstract, and therefore if erroneous, the judgment ought not to be reversed, as no injury is shown. [Castles v. McMath, 1 Ala. Rep. 326; Holmes v. Gayle, Ib. 517; Stone v. Stone, Ib. 582.]

GOLDTHWAITE, J.—1. If there was no indication of the legislative will, that this action should be governed by rules different from those which obtain in suits for malicious prosecutions, the strong analogy there is between the two would probably induce the same conclusions; but when the remedy by process of attachment was first given in this State, the plaintiff, as a prerequisite to the process, was directed to give bond with security, conditioned to be forfeit if the attachment was wrongfully, or vexatiously sued out; thus indicating, that the mere wrongful recourse to this process was a sufficient cause of action. This was the conclusion arrived at, at a very early day, in this Court. [Wilson v. Outlaw, Minor, 367.] The fifth section of the act of 1837, passed since that decision, expressly provides, that when any original attachment shall have been wrongfully, or vexatiously sued out, the defendant therein may, at any time, commence suit against the plaintiff, and recover any damages which he may have sustained; or to which he may be entitled, on account thereof, whether the suit be ended or not. [Clay's Dig. 61, § 32.] In actions for a malicious prosecution, malice is an essential matter, in the absence of which the action cannot be maintained, but in a suit of the kind we are now considering, it is only important, in connection with the question of damages.

2. It will be seen that a distinction seems to be hinted at, when the statute speaks of damages which the defendant in

the attachment may have sustained, as distinguishable from those to which he may be entitled, on account of the wrongful, or vexatious suing out of this process. Whenever an attachment is wrongfully sued out, and damage is thereby caused to the defendant in the suit, he is entitled to recover for the actual injury sustained by force of the statutory provision. And if, in addition to its being wrongfully sued out, it is also vexatiously, or in other terms, maliciously sued, then the defendant, upon the principle which governs the correlative action for a malicious prosecution, may recover damages as a compensation for the vexatious or malicious act; or in the terms of the statute, such damages as he may be entitled to on account of the vexatious suit.

3. In the present suit the allegation is, that the attachment was sued out without any reasonable or probable cause, and for the purpose of vexing and harassing the plaintiff. This we consider as substantially asserting, that the act was done wrongfully and vexatiously, for we cannot perceive how one can, without any reasonable cause, purposely vex and harass another, and yet escape the imputation of acting maliciously. We have already shown that the declaration would be good, so far as to warrant the recovery for the damages actually sustained, if it was only alledged that the attachment was wrongfully sued out, but as with the averments it contains, damages in the same nature as those given in suits for a malicious prosecution might be given, if warranted by proper evidence.

4. We consider there is no substantial distinction, whether the attachment sued out is original or ancillary, notwithstanding the statute speaks of those which are original only. The reason of the peculiar wording of the statute most probably grew out of the fact, that the act of 1837, is a mere compilation of former statutes on the subject of attachments, and the section referred to, was introduced to avoid the abatement of the attachment suit, by a plea, that the cause for issuing did not exist, as was held by this Court, in Brown v. Massey, 3 Stewart, 226. Precisely the same bond is required to be given in both cases, and there is no reason which will warrant a suit for wrongfully suing out the process as original, which does not apply where it is ancillary to a suit already commenced.

5. There can, we think, be no serious question, that the general authority given to an attorney at law, is sufficient to warrant him in suing out an attachment, whenever the facts exist, which will warrant it. It is said, that a letter of attorney to sue for, receive, and recover a debt, authorizes the attorney to arrest the debtor. [Paley on Agency, 160.] If this is true of a mere private person, the rule applies with equal force to one who is authorized by law as an attorney. The general rule is, that an authority is to be construed as to include all the necessary, or usual means of executing it with effect. [Howard v. Bailie, 2 H. B. 681.] It is even questionable, whether the general authority implied by the committing of business to an attorney at law, can be limited by special directions to act only in a particular manner, or upon the happening of a particular event; as such directions could not be known to those upon whom the general authority would act, or if known, the other party has no means to control the action of the attorney. An illustration of this rule would be shown, if a debtor was to apply for his discharge from arrest, on the ground, that it was made contrary to the instructions of the principal. Upon grounds of public policy, the act of an attorney at law is generally considered as the act of the client, if done within the general scope of the business of an attorney, though in point of fact, no authority has ever been given; and the exception is, only, where the attorney is unable to respond in damages for his unauthorized assumption of authority. So, too, this class of agents seem to have an exemption from liability which is peculiar. Thus, if one sue for a debt which he knows to be released, no action will lie against him, although he was a witness to the release. [Paley on Agency, 317.] These citations are sufficient to show, that the authority to sue out an attachment, is within the scope of the power of an attorney, and therefore, the principal is necessarily answerable in damages for the abuse of it. This conclusion shows, that the refusal of the Circuit Court to give the charge requested, was free from error, as that assumes, that the defendant was not liable, if the attorney had gone beyond his instructions.

6. Although the client is thus chargeable, even where the attorney goes beyond his instructions, when the unlawful act is

within the scope of his general powers, it does not follow, that he is liable in any way for the maliciousness, with which he may have been pursued by the attorney. So far as malice entered into to the wrongful suing out of this attachment, we think it very clear, that the client cannot be charged on account of this feeling in the attorney. It is a rule of universal application, that the principal is not answerable *criminaliter* for the act of his agent. [Horn v. Nichols, 1 Salk. 289.] And whenever damages are increased in consequence of malice entering into the act unlawfully done, this increase is, by way of punishment of the offender, as well as compensation to the injured party for his wounded feelings.

7. In the charge last given to the jury, we think the Circuit Court mistook the law. The question between the parties is, whether the attachment was wrongfully, or vexatiously sued out, and it seems to us a complete defence to the action, if the defendant, is able to show that any one of the causes existed which would warrant him in resorting to this process. The question is, not whether the precise ground stated in the affidavit is true, for it is obvious that the plaintiff has sustained no legal damage by the writ, if it was proper to be issued by changing the terms of the affidavit. The decision in Johnson v. Hale, 3 S. &. P. 331, that the affidavit cannot be made in the alternative, so far from showing that proof of this description, is no defence to the action, seems to us to indicate a different rule, when the defendant in the attachment cause complains of injury.

This conclusion renders it unnecessary to consider, whether the removal of the property of a debtor out of the State with intent to avoid the payment of the debt sued, is a fraudulent disposition of them within the meaning of the attachment law.

8. It is supposed however, that this charge is abstract, because the evidence is not stated from which alone it would be proper. We do not think this a just application of the rule, for here the charge is affirmative, and either given by the Court of its own motion, or, at the instance of the other party, and thus within the rule settled in Peden v. Moore, 1 S. & P. 71.

For the error we have just ascertained, the judgment of the Circuit Court is reversed, and the cause remanded.

HUGGINS v. CARTER & HEATHMAN.

1. Under the law authorizing the testimony of parties to the suit to be taken, the testimony of one living out of the State, may be taken, by a commission issuing by order of the Court.
2. Notice to the attorney of record is sufficient.

Error to the County Court of Lowndes.

DEBT by the plaintiff in error, against the defendant in error.

From a bill of exceptions taken in the cause, it appears, that the defendants offered in evidence, a paper, purporting to be taken in the State of North Carolina, and to be answers of the plaintiff to interrogatories filed in this cause, in which he denied that he had authorized the suit to be brought; and also, that the instrument sued on, was discharged by a payment, partly in money, and the residue in a note. The answers are sworn to, and purport to be signed by the plaintiff. The official character of the justice before whom the answers were taken, is certified by the clerk of Iredel County Court, and the authority of the clerk, by the chairman of the Court of Pleas and Quarter Sessions of Iredel county, North Carolina.

The plaintiff's attorney objected to the reading of the papers, because there was no proof that the plaintiff executed it, or in any manner authorized its execution, but the Court permitted it to be read, as it purported on its face, to be taken by a person commissioned by the clerk of the Court, as in cases of taking the testimony of witnesses by interrogatories.

It was further objected, that the plaintiff lived beyond the State, and could not be called on, to answer interrogatories. That notice had not been served on the plaintiff, but upon his counsel. That the answers were sworn to before some authority unknown to the laws of this State—and that the answers were not filed by the plaintiff; all which objections were overruled by the Court, and the answer being read, the Court, on

motion of the defendant's counsel, withdrew the cause from the jury, and dismissed the same, at the cost of the plaintiff.

To all which the plaintiff excepted, and which he now assigns as error.

Cook, for the plaintiff in error.

Gilchrist, contra.

ORMOND, J.—If the admission of the plaintiffs found in the record, were admissible as evidence, it would be very clear, that the Court acted right in dismissing the suit. From that, it appears, not only that he never authorized the suit to be brought, but that no suit could be maintained on the instrument sued upon, unless it had been shown, that some one else had a right to institute the suit in his name.

The paper offered in evidence, cannot be considered as the deposition of the plaintiff, because it does not appear, that the person by whom it was taken, was authorized to act by a commission emanating from the County Court of Lowndes, or from its clerk, delegating to him such power; it is therefore an *ex parte* proceeding, and entitled to no weight whatever, as evidence.

It appears to have been designed as a proceeding under the statute, requiring the plaintiff to answer interrogatories, to be read on the trial of the cause; but so considered it is wholly irregular. Neither the interrogatories, the order of the Court directing the plaintiff to answer, nor the order of the Court directing the clerk to issue a commission for the purpose of having the answers of the plaintiffs certified, appears upon the record. Some of these things do appear in the paper certified from North Carolina, but being objected to, they cannot be regarded as a part of the record.

It appears to have been supposed, that it was necessary for the party filing the interrogatories, to procure the answers and file them, but such was not the intention of the statute. The interrogatories were designed as a substitute for a bill of discovery, which the opposite party is required to answer. If he, being plaintiff, fail to do so, the Court may dismiss the cause; or, being defendant, may render judgment against him, as by default. [Clay's Dig. 341, § 160.]

We do not doubt, that the law applies to non-resident plaintiffs as well as to those resident within the State. In such a case, it would be the duty of the Court, to direct a commission to issue, to take and certify the answers, and to stay the proceedings a sufficient length of time to obtain the answer.

That notice of the interrogatories may be served on the attorney of the party, see 6 Ala. Rep. 257.

Let the judgment be reversed and the cause remanded.

HILL v. SLAUGHTER.

1. A *fieri facias* operates a lien upon the goods and chattels of the defendant, that are within the county to which it issues, and the lien will not be lost by their removal to a different county, if another *fieri facias* is regularly issued as provided by the act of 1828.
2. Where the lien of a *fieri facias* is suspended, by the removal of property from the county to which it issues to another; in order to revive it, the plaintiff should cause a *fieri facias* to be issued to the latter county; the transfer of the execution from the sheriff of the former to the sheriff of the latter, with a notice of the lien, cannot have the effect to continue or revive it.

Writ of error to the Circuit Court of Macon.

This was a motion against the sheriff of Tallapoosa, for the failure to pay over money collected on a *fieri facias*. The following facts were agreed, viz: The execution in favor of the plaintiff was issued from the Circuit Court of Macon, in December, 1842, upon a judgment recovered against Fitzpatrick and Mims, for the sum of $2,062 77, and costs. An execution was sued out soon after the rendition of the judgment, but the lapse of a term intervened, after its return, before the *fi. fa.* in question issued. This latter execution was placed in the

defendant's hands as the sheriff of Tallapoosa, on the 20th December, 1842, and was levied on the same day upon a negro man, as the property of Fitzpatrick, who was afterwards sold by the sheriff, for the sum of four hundred dollars; which sum is now in the defendant's hands. Samuel A. Bailey claimed the money for which the slave sold, under an execution issued from the Court of Chancery, at Tuskegee, on the 18th July, 1842, returnable in May, 1843, founded upon a decree rendered in 1842, and delivered to the sheriff of Macon, on the day of its date. At the time this latter execution was received by the sheriff, the slave that was sold in Tallapoosa, was in Macon, but he was not levied on. Bailey's execution was against the goods, &c. of Mims, Fitzpatrick and others, and after the plaintiff's execution was levied, was transferred to the hands of the defendant, on the 2d January, 1843, and notice given him before the sale of the slave, that the money for which he might sell, would be claimed thereon. Several other parties had *fi. fas.* in the same predicament, in all respects, as Bailey's, for an aggregate amount greater than the money in the defendant's hands. The Circuit Court determined that the executions in favor of Bailey and others similarly situated, were entitled to priority, and rendered judgment against Hill for costs.

G. W. Gunn, with whom were Peck & L. Clark, for the plaintiff in error, made the following points:

1. Conceding that a lien upon the slave attached in favor of Bailey and others, yet his removal to Tallapoosa before a levy, authorized the sheriff of the latter county to seize and sell him to satisfy the plaintiff's *fi. fa.*

2. A *fi. fa.* only binds the goods, &c. within the county to which it issues; and being received by the sheriff of one county, it cannot be withdrawn from him, and sent to another county to be executed. [Clay's Dig. 336, § 132; Brown & Milton v. Baker, Sprouls & Co. 9 Porter's Rep. 503; Pond v. Griffin, 1 Ala. Rep. 678; Claggett v. Foree, 1 Dana's Rep. 428.]

No counsel appeared for the defendant.

COLLIER, C. J.—In Brown & Milton v. Baker, Sprouls & Co. 9 Porter's Rep. 503, we held that it was not permissible for the sheriff of one county to transfer to the sheriff of another

a writ of *fieri facias* which he had received and acted on. The statute making it the duty of a sheriff, in whose hands either mesne or final process is placed for service, to execute and return the same, or to return it if it cannot be executed, he cannot excuse a compliance with this requirement, by placing a *fieri facias* with which he was charged, in the hands of the sheriff of some other county. If the plaintiff desires an execution to be issued elsewhere, he should cause that already out to be returned *no property found*, or procure another at his own expense.

In Pond v. Griffin, 1 Ala. Rep. N. S. 678, we determined that a *fieri facias* only binds the goods and chattels of the defendant in the particular county to which it issues. The Court of Appeals of Kentucky, upon a statute similar to ours, made the same decision, adding, that when the lien once attached, it was not lost by the temporary removal of the property. [Claggett v. Foree, 1 Dana's Rep. 428.]

The second section of the act of 1828, (Clay's Dig. 209, § 43,) after adjusting the liens between contending executions, proceeds thus, "but if a term shall not have elapsed, and the *alias* shall be delivered to the sheriff before the sale of property, under a junior execution in favor of another creditor, the lien shall continue, notwithstanding the *alias* may not have been delivered until after such junior execution; but if such *alias* shall not be delivered until after the sale under such junior execution, the lien of the latter shall prevail."

That the delivery of the executions in favor of Bailey and others, to the sheriff of Macon, created a lien upon the slave, because he was within the county, has not been controverted. This lien however, became inoperative, though not lost, by the removal of the slave to Tallapoosa, and it would have been competent for the plaintiffs in these executions to have reasserted their liens in that county. This they attempted to do by the transfer of their executions, with notices to the sheriff, that they claimed the proceeds of the sale. That this was an irregular course of procedure, and could not create or revive a lien, the vitality of which was suspended, we think is directly shown by the case cited from 9th Porter. The spirit of the statute referred to, shows the intention of the legislature to give to a junior execution, the priority, where the plain-

tiff having the older one has not asserted a lien, until a sale has been made of property levied on, under the authority of the former.

If Bailey and others, having the elder *fi. fas.* would have prevented the plaintiffs from appropriating the money to his execution, they should have caused executions to be issued and placed in the hands of the defendant, before a sale of the slave took place. This not being done, their suspended liens were never made operative again; consequently the plaintiff is entitled to the money in the sheriff's hands. The judgment is therefore reversed and the cause remanded.

SAMUELS v. FINDLEY.

1. Where a decree has been made by the Orphans' Court directing an executor to convey land, which his testator in his lifetime had sold, and agreed by bond to make titles for, the jurisdiction of that Court attaches upon the filing of a petition setting out the sale, the agreement by bond, &c., to convey, the death of the obligor, and the grant of letters by the Court to which the petition is made; and such decree cannot be collaterally impeached when the jurisdiction has attached, though there may be error in the proceedings.
2. An admission that the damages for the mesne profits shall be entered at a certain sum, if the plaintiff is entitled to a judgment, dispenses with proof that the defendant was in possession at the time of suit.

Writ of error to the Circuit Court of Benton.

Trespass to try title by Findley against Samuels. The declaration is in the usual form, and was demurred to by the defendant, who after his demurrer was overruled, pleaded the general issue.

At the trial the defendant demurred to the plaintiff's evidence, and it was admitted the plaintiff was entitled to seven-

ty-five dollars as *mesne profits*, if he should have a judgment. The evidence was—1. A patent dated 5th August, 1837, conveying title to John D. McReynolds, for one of the eighty acre tracts of land sued for. 2. The receiver's receipt of the proper land office for the payment by the said McReynolds for the other eighty acre tract of land sued for, dated the 1st of December, 1836. 3. Proof that McReynolds died in 1837, and that one Lloyd was duly qualified as the executor of McReynolds' last will. 4. A petition made by one McCampbell filed in the County Court of Benton county, the 15th September, 1840, setting out that McCampbell, on the 15th February, 1837, had purchased of McReynolds both the eighty acre tracts here sued for, for a sum of money paid; that McReynolds then executed to him a bond for titles, obliging himself to make titles to the petitioner for said lands, as soon as patents should be issued to McReynolds for the same. The bond is made an exhibit to the petition, which asserts that McReynolds then transferred the certificates of entry to the petitioner; one of which he had returned to the land office, and received the patent in lieu of it; and the other of which he would present at the hearing, if in the meantime the patent should not be issued. It alledges the death of McReynolds—the appointment and qualifying of Lloyd as his executor—and states that McReynolds left at his death, children and heirs at law, whose names are set out with the allegation that they are minors, under the age of fourteen years; and that Sarah, his relict and widow, had died since the death of McReynolds. It prays that the proper notice may be given to the parties concerned, and that the executor of McReynolds may be decreed to make titles to the petitioner, agreeably to the condition of the said title bond.

5. An order of the County Court made at a special term, in September, 1840, setting out the substance of the petition, and directing that publication should be made in a newspaper named in the order, once a month for three months, requiring Lloyd and others, who might be interested to appear before that Court, on the 1st Friday in January, 1841, to show cause if any they could, why titles should not be decreed to McCampbell, according to the title bond. At the proper term, in January, 1841, the hearing of the petition was continued to 1st Friday of February. After this order, a third person filed

a bill in equity, and for a time enjoined the decree for title prayed by McCampbell, and after this injunction was dissolved he notified Lloyd of its dissolution, and that he should apply for an order to make titles on the 2d December, 1841. A final decree on the petition was rendered on that day, reciting the continuance under the injunction, and directing Lloyd as executor of McReynolds to execute titles to McCampbell, according to the bond of his testator. No proof was offered showing that any advertisement or publication had been made under the order upon the petition.

6. A deed executed by Lloyd as executor of McReynolds on the 27th December, 1841, conveying to McCampbell the lands in controversy, the same as those named in the decree.

7. A conveyance dated 4th of October, 1839, from McCampbell to the plaintiff for the same lands, with covenant of warranty.

The Court gave judgment for the plaintiff for the recovery of the lands described in the declaration, and also for seventy-five dollars damages.

The judgment upon the demurrer to the evidence is now assigned is error.

S. F. Rice, for the plaintiff in error, made the following points:

1. That the action of the County Court upon the petition of McCampbell was entirely void, and no title was acquired by the deed executed by Lloyd under the decree. 1. Because the petition was not sufficient to confer jurisdiction, as it is not shown by it, that McReynolds in his lifetime *did not* make the title. 2. Because when the petition was filed, no title was derivable according to the terms of the bond, it not being shown that patents for both tracts had issued. [Blann v. Grant, 6 Ala. Rep. 110] The petition is a substitute for a bill in Chancery, but was intended to give a summary remedy. It ought, therefore, to contain the same allegations as a bill. [Lacy v. Simpson, Minor, 33.]

2. The authority conferred on the County Court is a naked power, and therefore the publication in conformity with the order should have been shown. [Pope v. Hendon, 5 Ala. Rep. 433; Bonner v. Greenlee, 6 Ala. Rep. 411.]

3. This action can only be maintained against the tenant in possession, (Bonner v. Greenlee, 6 Ala. Rep. 411,) and here there is no proof that the defendant was in possession. The agreement is, that if the plaintiff is entitled to a judgment, he shall have a certain sum as *mesne profits*, but this will not cure the defect of proof in this particular.

Wm. B. Martin, contra—insisted that every question raised was governed by previous decisions of the Court.

GOLDTHWAITE, J.—Upon the principal point presented by this record, the decision in Wyman v. Campbell, 6 Porter, 219, is quite decisive. There it was held, that a decree of the Orphans' Court pronounced in a cause of which it had jurisdiction, could not be collaterally impeached, although sufficient error was apparent upon the proceedings to have reversed the decree. The only matter to be ascertained here, to bring this case within the influence of that decision, is, whether the jurisdiction of the County Court had attached.

Our statute provides, that when any person owning lands or tenements shall sell the same, and enter into bond, &c , to make titles, and shall depart this life without having made titles, in that case the person to whom such bond, &c. was given, his executors, &c., may petition the Orphans' Court of the county, where probate of the will of such deceased person was taken, or letters of administration granted, to compel the executors, &c., to made title agreeably to the bond, &c. The manner of giving information to those concerned, is by notice in some newspaper, once a month for three months, when the Court may, if they find the contract was fairly made, order the executors, &c., to make titles, as such, to the land, &c., sold by their testator, or intestate. [Clay's Dig. 157, § 38.] It is supposed by the counsel that it does not sufficiently appear from the petition, that the decedent was the owner of the land sold; and Simpson v. Simpson, Minor, 33, is relied on to sustain the position that such an averment is material. We should suppose there could be scarcely a stronger presumption of ownership, than the assuming to sell the land; but, however, the presumption from this may be, it otherwise, by the petition, sufficiently appears, that the land was purchased by McReynolds

of the United States, and that certificates of purchase were issued to him. The filing of the petition then, was the matter upon which the jurisdiction of the Court attached; it being therein shown, that a bond for titles had been executed, that the party was dead, and that administration upon his estate, or letters testamentary, were granted by the Court entertaining the petition. These are all sufficiently averred in the petition, and the inference is very strong that it also appeared that the condition of the bond had not been complied with, though if the inference was otherwise, the decree would only be erroneous, and not void. The period when the jurisdiction attaches was considered in Couch v. Robinson, 6 Porter, 262, and there held, to be in full exercise, under a similar statute, when the Court made the order for a citation to issue to the heirs. By analogy to that case, the jurisdiction here attached upon the order of publication. We think the decree of the Orphans' Court was rendered in a cause of which it had jurisdiction, and therefore it is unnecessary to go further, or ascertain it to be free from error.

2. No other inference can be drawn from the agreement or admission with respect to damages, than that the contest was with the proper person, and although no proof is set out in the demurrer to evidence, showing the defendant was in possession at the commencement of the suit, we are constrained to presume such was the fact, because he appears to contest the right of the plaintiff on the merits of the case to recover. If there had been a slip in this particular before the jury, and the case before them was contested on the merits, it would require but slight proof of possession to warrant a verdict. The admission found in the case would be sufficient for a jury, and consequently is so with a Court upon demurrer.

There seems to be no error in the record. Affirmed.

GARY, USE, &c. v. JAMES.

1. under an agreement by the payee that any note the maker will obtain on him, shall be a good set off, a note against the payee, though not indorsed, will be a good set off against the note when sued on, for the use of another; the set off being obtained before notice that the beneficial plaintiff had acquired an interest in it.

Error to the County Court of Sumter.

Assumpsit by plaintiff, against defendant in error, upon a promissory note. The defendant pleaded non-assumpsit, set off, and payment.

Upon the trial, the defendant proved, that the plaintiff, after the note sued on was made, agreed with the defendant, that any note he might procure on him should be an off set to the note of plaintiff. The plaintiff's counsel objected to parol proof of this agreement, but the Court overruled the objection. It was proved, that when Joseph W. Perry, for whose use the suit was brought, presented the note for payment to the defendant, he refused to pay, because he held a note on the plaintiff. It was also proved, that the plaintiff admitted, that the note offered in evidence as an off set, which was payable to one Sims, or bearer, but was not indorsed, was genuine. There was no proof when Perry obtained an interest in the note sued on, or when the defendant obtained the note offered as an off set, and showed no interest in it further than the possession.

The counsel for the plaintiff moved the Court to charge, that the note being payable to bearer, was not a legal off set in the hands of the defendant; which the Court gave, but also charged, that if there was an agreement between the plaintiff and defendant, that any note the latter might obtain against the former should be an off set, then the note would be a set off, and the possession of it was sufficient proof of interest. To all which the plaintiff excepted, and which he now assigns as error.

GREENE, for plaintiff in error, cited 1 Ala. Rep. 43; 7 Porter, 549.

HAIR, contra, cited 2 Ala. Rep. 284; 4 Id. 663; 1 Id. 41; 3 Id. 256; 1 Porter, 359; 3 Stewart & P. 35.

ORMOND, J.—The charge of the Court was strictly correct. The note which the defendant held upon the nominal plaintiff, was not good as a set off, because he could not maintain an action thereon in his own name. Upon the other ground, however, that the note was procured upon an agreement with Garey, the nominal plaintiff, that it should be set off against the note sued on, it comes within the principle of French v. Garner, 7 Porter, 549. Under that agreement, it would have been a good set off against him, and is therefore good against the beneficial plaintiff, as it was obtained before notice, that the interest of Garey in the note had been transferred. There is no objection to making this proof by parol. Let the judgment be affirmed.

OWEN v. HENDERSON.

1. *Semble*—a replication should not contain two answers to the same plea, but it may put in issue several facts where they amount to only one connected proposition; and it may contain distinct answers to different parts of the plea, divisible in its nature.
2. A replication to the statute of limitations, that the defendant held the money sought to be recovered, *in trust* for the plaintiff, is bad; the particular character of the trust should be set out, that it might be seen whether it was one of exclusive equitable cognizance, or one against which the statute does not run.
3. A writing acknowledging the receipt of money of the plaintiff, and promising to pay it to him presently, cannot be varied by parol proof, showing that it was to be paid into a Bank, some twenty or thirty miles from the plaintiff's residence.

But if the defendant has paid the money into Bank by plaintiff's direction, he might have shown it in his defence; or if he had promised thus to pay it after the note was made, and failed, *perhaps* the plaintiff might show such promise as an excuse for the failure to sue within six years.

4. A promise to pay, without designating any time, imposes a present duty, and the statute of limitations begins to run immediately.

Writ of error to the Circuit Court of Lawrence.

THE defendant in error declared against the plaintiff in assumpsit, alledging, that on the 19th February, 1836, he was indebted to him in the sum of two hundred and fifty dollars, for so much money before that time had and received; and also in an equal sum, for so much money paid, laid out and expended, &c.

The defendant pleaded non-assumpsit, payment, set off, and the statute of limitations. On the three first pleas issues were joined; to the fourth, the plaintiff replied, that the defendant promised to pay within six years previous to the commencement of the suit, unless he could show that he had paid the money into Bank, as he has agreed to do; the non-payment into the Bank is then averred. And the plaintiff further replied, that the defendant held the money for the recovery of which this action was brought, in trust for the plaintiff, and that the claim sued for, was not barred by the statute of limitations. There was a demurrer to this replication, which the record does not show, was disposed of, but it is admitted it was overruled.

The cause was tried by a jury, who returned a verdict in favor of the plaintiff for three hundred and ten dollars damages, and judgment was rendered accordingly. On the trial the defendant excepted to the ruling of the Court. It appears, from the bill of exceptions, that the plaintiff offered in evidence a writing signed by the defendant, of the following tenor: "Rec'd. Moulton, of Samuel Henderson, two hundred and fifty dollars, to be paid in hand. February 19th, 1836. F. C. OWEN." The plaintiff then proposed to prove by D. G. Ligon, that defendant in a conversation with him about the writing adduced, admitted that the sum therein expressed, was to have been paid into the Branch of the Bank of the State of Alabama at Decatur, for the benefit of the plaintiff. To the

admission of this testimony the defendant objected, on the ground, that it tended to vary his written undertaking; but the objection was overruled, and the witness permitted to testify. The same witness further stated, that as the plaintiff's agent he presented the writing to the defendant, in the fall of 1841, and demanded payment thereof. This was the first demand proved. It was not shown that the defendant made the writing as the agent of the plaintiff, or otherwise, except as shown by his signature thereto.

The defendant then proved that both the plaintiff and himself were residents of the town of Moulton, and its vicinity, and that Decatur was but twenty-two miles distant from their residence.

The defendant prayed the Court to charge the jury, that as the writing adduced by the plaintiff did not specify any day of payment, it was to be considered as due within a reasonable time after its date, and that it was to be inferred from all the facts proved, what was a reasonable time. This charge was refused, and the Court charged the jury, that if they believed the defendant held the money as the agent of the plaintiff, and had not paid it into Bank, the same was not due, until it was demanded; and if a demand was not made until the fall of 1841, it was not due until that time, and the statute of limitations did not begin to run sooner.

L. P. Walker, for the plaintiff in error, made the following points: 1. The replication to the fourth plea is double, presenting two distinct issues, one of fact and another of law, and could only be answered by two rejoinders, and should have been held bad. [1 Chitty's Plead. 260; 4 Phil. Ev. 136, 234: 20 Johns. Rep. 33.] 2. An attorney who receives money, is not such a trustee that he cannot plead the statute of limitations. [1 Rand. Rep. 284.] 3. The writing itself must determine when the money was demandable, and the plaintiff cannot countervail the statute of limitations by extrinsic proof, even if it were possible for him to show, positive ignorance of the defendant's failure to pay the money into the Bank. [Mardis' adm'rs. v. Shackleford, 4 Ala. Rep. 506-7; Kavanaugh, adm'r. v. Weedon, 1 Ala. Rep. 231; Maury's adm'r. v. Mason's adm'r. 8 Porter's Rep. 219; Murray v. Coster, 20 Johns. Rep. 576.]

W. Cooper, for the defendant in error, insisted—1. The writing on which plaintiff below relied, might be explained by parol proof. 2. The statute of limitations did not begin to run, until Henderson had notice, that Owen had not paid the money into the Bank, or that he claimed adversely. The non-payment was a fraud, and the statute does not begin to run where there is a fraud, until the fraud is discovered. [Wells v. Fisk, 3 Pick. Rep. 74; Saxton v. Chamberlain, 6 Pick. Rep. 426; Farnham v. Brooks, 9 Pick. Rep, 212; Lewis v. Stafford, 4 Bibb's Rep. 321; Mass. Turn. P. Co. v. Field, 3 Mass. Rep. 201.]

COLLIER, C. J.—The replication, it is said, should not be double, or in other words, contain two answers to the same plea; although it may put in issue several facts, where they amount to only one connected proposition, and it may contain distinct answers, to different parts of a plea divisable in its nature. So far as the replication sets out a conditional promise to pay within six years, it is certainly good; but the latter branch, which insists that the defendant held the money in trust for the plaintiff, is bad. It is difficult to conceive of a trust that could be enforced at law, against which the statute of limitations would not run; but be this as it may, the character of the trust should be set out, that the Court might see whether it was entitled to the exemption claimed.

It is difficult to conceive, what it would avail the plaintiff to show, that the defendant undertook to pay the amount expressed in the receipt, into the Branch Bank at Decatur. If intended to vary the legal effect of the writing, it was clearly inadmissible. The interpretation of the defendant's contract as evidenced by the paper, is an acknowledgment, that he had received two hundred and fifty dollars, and would pay that sum to the plaintiff when required, or immediately. It is certainly very awkwardly expressed, but the words, "to be paid in hand," must at least mean to be paid to the party advancing the money; whether presently or not, is wholly immaterial, as the failure to stipulate a time, makes it due, as soon as the writing was delivered.

If the defendant had paid the money into Bank, by the plaintiff's directions, he might have shown it as a defence. So, if

he promised thus to dispose of it, after the writing was made, the plaintiff might, perhaps, show such promise, as an excuse for not suing until time was afforded for that purpose. What that time should be, would of course depend upon the distance of the defendant's residence from the Bank, its accessibility, &c.

The contract, we have seen, was an undertaking to pay the money presently, or on request; the charge of the Court, that it was not due until demand made, cannot be supported. The duty imposed upon the defendant being such as we have indicated, the statute of limitations began to run from the date of his promise. [See Mardis' adm'rs. v. Shackleford, 4 Ala. Rep. 493; Johnson v. Johnson, 5 Ala. Rep. 90.]

The facts stated in the bill of exceptions, and the ruling of the Circuit Court, do not require us to give to this case a more extended consideration. The consequence is, that the judgment must be reversed and the cause remanded.

QUINN, ET AL. v WISWALL.

1. In this State a judgment binds lands only from the time of its rendition, and has no relation to the first day of the term.
2. A writ of *venditioni exponas*, which contains no *fieri facias* clause, does not invest the sheriff with authority to sell other property than is named, or to create or to continue a lien.
3. The sale under a junior judgment which is not a lien upon the lands sold, cannot be sustained by referring the sale to the authority given by an older execution, and judgment, when the older execution was not in the sheriff's hands at the time of the sale.

Writ of error to the Circuit Court of Mobile.

EJECTMENT to recover certain lands in the city of Mobile. Quinn was the tenant in possession, but James McWhinnie was admitted to defend as landlord.

The title made by Wiswall, the plaintiff, is this: In the year 1830, and for several years afterwards, one John Wiley was in possession of the premises sued for. On the 10th June, 1839, one Hunt recovered judgment in the County Court of Mobile, against Wiley, for $937. A writ of *fi. fa.* issued on this judgment, on the 8th July afterwards, which, on the 31st January, was levied on a lot of land different from that in controversy. That was returned as unsold for want of time, and it was advertised to be sold on the first Monday in March, 1840. On the 8th February, a writ, in form a *venditioni exponas* issued, directing the sheriff to sell the land he had previously returned as unsold for want of time. This writ was returned, that all proceedings on it had been stayed by order of Hunt's agent. Another writ of the same nature issued on the 10th July, 1840, which was returned in these terms, "after duly advertising the within described property, I sold the same, on the first Monday in November, 1840, to Thomas McWhinney, for the sum of ten dollars. And I also sold, on the same day, the following described lands, which were sold by virtue of other executions in my hands against the same defendant, but the proceeds of the sale were applied to this judgment, it being the oldest judgment against the defendant." After this is a description of several lots of land, and in particular that which is the subject of this suit. On the 18th February, 1840, one Gurden recovered judgment in the County Court of Mobile, against Wiley, for $1,258. On this, execution issued on the 18th April afterwards, which was returned "no property found." An alias issued on the 25th June, of the same year. This was levied on the land in controversy, as also upon other lands, and it was sold by the sheriff, on the first Monday of November, 1840, to the plaintiff Wiswall, to whom the sheriff executed a deed, bearing date 2d November, 1840. The return of this alias execution specifies that the proceeds of the sale was applied to the judgment obtained by Hunt.

The defendant made title by producing a deed for the land in controversey, from one Innerrarity to Wiley, and one John Hall, dated 10th February, 1831. Also a deed from Wiley,

dated 8th February, 1840, conveying the land to the defendant, McWhinnie.

On this state of proof, the Court charged the jury that the sale made by the sheriff, by virtue of the execution before named, had relation to the day of the date of the judgment in favor of Hunt; and that the sheriff's deed conveyed the lands in controversy to the plaintiff, as of the day of the date of that judgment; and therefore the plaintiff was entitled to recover.

The defendant also claimed that Hall's portion of the land had been devised by a will, made by Hall, who was the joint owner under the deed from Innerrarity, and to shew this, produced the will of Hall, admitted to probate by the judge of the County Court of Mobile, on the 16th September, 1833, but there were no subscribing witnesses to it; and for this reason the Court excluded it from the jury. The defendants having excepted to this exclusion, as well as the charge of the Court, now assigns that the Court erred in these particulars.

Gibbons, for the plaintiff in error, insisted, that whatever lien might be awarded to Hunt's judgment, it could not be enforced, unless there was an execution in the hands of the sheriff, for otherwise, if he sold, he would be acting without authority. It is evident, that unless Wiswall's title can be referred to, and supported by, Hunt's judgment, he cannot succeed, because McWhinnie's title was derived from Wiley, on the 8th February, 1840, and Gurden's judgment, under which the land was sold, was not obtained until the 18th of the same month.

Hall's will was necessary to show a title derived from him for one half of the land, in the event of failing under Wiley's title. The question of will or no will, was one for the probate Court, and could not be revised collaterally.

Stewart, contra, urged the following points to sustain the judgment of the Court below:

1. Considering the sale as made under Gurden's execution, the title of Wiswall is good. The term commenced on the 8th February, 1840, the same day that Wiley executed his deed to McWhinnie. Although the judgment was obtained on the 18th of that month, it related back to the commencement of the term, as between the creditor and the assignee of the debtor. [8 Leigh, 272.]

2. The sale to Wiswall may be sustained by a constructive levy, applicable to Hunt's *vend. expo.* as that was in the sheriff's hands when the levy and sale was made, under the junior judgment. An actual levy is not necessary to be made on each execution, when there are more than one, to support a sale. The same effect ought to be given to a *vend. expo.* when it fails to produce the sum necessary to satisfy the judgment, because the creditor has evinced his determination to have his due, as fully as if a *fi. fa.* had been sued out. No injustice could ever be wrought by giving such an effect to the first named writ, because in point of fact, that is as much the continuance of the execution as if there was a general *fi. fa.* That a constructive levy is sufficient and a sale under it will be supported, see 5 Cowen, 390; 17 John. 121; 1 Hill, N. Y. 559; 13 John. 97; 2 Dunlap's P. 797, 800; 3 Ala. Rep. 111; 7 Wend. 83; 2 West. C. C. 280; 7 Taunt. 56; 1 Term. 729.

3. The defendants do not set out the sheriff's deed to Wiswall, but in point of fact it purports to convey all the title which Wiley had to the land, at the date of Hunt's judgment. Now this deed passes the title, if the sheriff had power to pass it. And it is immaterial what irregularities occur in the execution, the sheriff's acts under it, or in the deed. All that is necessary is—1. A judgment. 2. A command to execute it; and 3. A sale of land for its payment. [8 John. 361; 3 Munf. 263; 3 Howard, 66; 3 Munf. 546; 2 Dunlap's Pr. 814, 816; 13 John. 97; Watson on Shffs. 136; 5 Ala. Rep. 58.]

4. The sale may also be supported under the original execution, as the levy made under it was not sufficient to satisfy the judgment. The question here, is not between two judgment creditors, but between a purchaser whose right is good, if it can be referred to any sufficient levy. Where lands are concerned, the levy is very unimportant, as the fact of lien is referred to the judgment, and is neither delayed by a levy on personal chattels afterwards restored to the debtor, nor by a levy on other lands. [4 Ohio, 378.] A sale made after the return day of the execution, is not for that cause void. [4 Wheat, 504; 13 John. 97; 2 Dunlap, Pr. 800; Watson on Shffs. 136, 189; 3 Scammon, 557.]

5. If the money was in the sheriff's hands, neither Gurden the junior creditor, nor Wiley could successfully resist a mo

tion for him to apply it as he has done; and if Hunt can retain the money, it seems certain that the sale will be supported. If the sheriff had a *ca. sa.* instead of a *fi. fa.* or *vend. ex.* the same result would follow. [9 Porter, 201.]

GOLDTHWAITE, J.—1. It is generally assumed by the commentators that it was a settled rule of the common law that judgments in either of the superior Courts, had relation to the first day of the term, and that a consequence of this relation, was the overreaching of even *bona fide* alienations of lands made by the debtor before the rendition of the judgment, but after the commencement of the term. [3 Black. Com. 324; 2 Saund. 8 K.; Farm v. Atkinson, Willis, 427; Bragner v. Longwood, 7 Term. 20; 2 Bacon Ab. Ex. J.; Johnson v. Smith, 2 Burr. 950.] In 3 Salk. 212, it is said, that Lord Holt recognized the general rule, but an exception was, when the record showed the contrary, as where there was a memorandum on the roll, or a continuance of the cause until a future day of the term. Lord Mansfield, in Portchester v. Petrie, of which a note is given 2 Wm's. Saund. 148 b., says, that Hays v. Wright, Yelv. 35, and Miller v. Bradley, 8 Mod. are to the same effect. We think it very possible, that if the statute of 29 Chas. 2, had never been passed, it would long since have been discovered, that the earlier *dicta* of the English judges on this matter, (for we have been able to find, no case, where a *bona fide* alienation was held inoperative against a subsequent judgment,) were contrary to the general spirit of the common law, and especially to that maxim, which declares that a legal fiction shall work injury to no one. It is true, the particular sections of the statute of frauds, intended to extirpate the mischiefs, which grew out of holding a judgment to have relation to the first day of the term, have never, in terms, been re-enacted in this State; but there are enactments which produce the same effect. Thus the records of the respective Courts within this State, for each preceding day of every session, shall be read in open Court, on the morning of the succeeding day. [Clay's Dig. 296, § 38.] And all judgments shall bear interest from their date. [Ib. 284, § 5.] But what is entirely conclusive of the subject, is, that the act which gives the writ of *elegit*, directs the sheriff to cause to be delivered to the plaintiff, a moiety of

the lands, &c. whereof the defendant *at the day of obtaining the judgment*, or at any time afterwards was seized. [Ib. 200, § 1.] The decision in Morris v. Ellis, 3 Ala. Rep. 560, shows that the subsequent act giving a *fi. fa.* upon judgments, is to be construed in connection with that which previously gave the *elegit*, and binds in the same manner.

We deem it useless, therefore, to consider the case of Coutts v. Walker, 2 Leigh, 268, and the other Virginia cases, in which a different conclusion is arrived at. This reasoning necessarily disposes of that branch of the plaintiff's argument, which insists that the sale was good under Gurden's execution, by making the judgment relate to the first day of the term. [Pope v. Brandon, et al. 2 Stew. Rep. 401.]

2. The *venditioni exponas* issued at the suit of Hunt, although in the hands of the sheriff, at the time he made the sale under the writs of *fi. fa.* at the suit of other creditors, contained no claim authorizing the sheriff to levy anew if the property described did not produce sufficient to satisfy the judgment, and therefore did not operate to transfer to it the levy subsequently made under junior judgments. The like proceedings which the statute directs to be had on such a writ, refer to what might, and ought to have been had in relation to the effects levied upon, and not to property generally. [Clay's Dig. 203, § 9.] Ordinarily, the writ of *venditioni exponas* is a mere command to the sheriff to perform a part of his duty which has been omitted, but it may also be a *fi. fa.* for the residue of the debt, when the goods taken are not sufficient to satisfy the whole. [2 Saund, 47, r.] In the present case the writ merely commands the sheriff to expose lands to sale, which he had previously levied on, and a purchaser searching the office would not receive any information from it, that it was an authority to sell any other property than that mentioned in it. It would in our opinion, be carrying the doctrine of liens much too far to transfer one from a junior judgment, to an older one, when the only connection is the existence of a *vend. ex.* The reason why a sheriff's sale is held good, although actually made under an execution having no lien, when in fact he has the authority to sell under another, is, the purchaser is only required to ascertain the right of the sheriff to make the sale under some valid process. So far as the purchaser is concerned, the sale

resolves itself into a question of authority to sell, or the want of it. This authority is derived from a judgment, the command to execute it, and its actual execution. [Bradford v. Ware, 2 Ala. Rep. 676, and cases there cited; to which may be added those cited by the plaintiff.]

3. All the other points pressed by the plaintiff may be briefly answered, with the observation, that the defect of his title, as exhibited, is, that the sheriff was invested with no authority reaching the land sold by him. The execution first issued on Hunt's judgment, had ceased to confer any authority, because no levy was made under it, so as to affect the land in question, and that might as well have been sold under any other dormant judgment. There is nothing in the case of Campbell v. Spence, 4 Ala. Rep. 543, or Webb v. Bumpass, 9 Porter, 201, which is not in accordance with the views now expressed, as both of them recognize the general principle, that a purchaser will not be required to investigate the conflicting liens of different plaintiffs, and the former was an adjudication upon, not as supposed, the liens of different judgments, but of judgments sought to be enforced by existing executions. It is not for us now to settle, either the rights of Gurden against Hunt, or against the sheriff, or to show that Hunt, if forced to refund the purchase money, either to Wiswall or to Gurden, may yet enforce his lien against the land now in controversy. All these questions are foreign to this case, though, doubtless, properly enough adverted to, as showing what consequences must grow out of our decision.

Our conclusion is, that the Circuit Court erred in instructing the jury, that the sale by the sheriff had relation to the date of Hunt's judgment, and that his deed conveyed the land in controversy as of that date. As this point will probably be decisive of the cause, but the more especially as no foundation is laid for raising the question in relation to the proof of the will, we decline to decide it.

Let the judgment be reversed and remanded.

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OLDS v. POWELL.

1. Property sent home with a new married couple, will be presumed to be a *gift*, unless at the time a less estate is declared, or limited. Whether such a transaction is a gift, or a mere loan, is a question of intention; any fact therefore, which affords evidence of such intention, is admissible as a part of the *res gestæ*.
2. A declaration by the parent at or about the time, is evidence of his intention, though made in the absence of the son-in-law; a declaration made previously, or act done, upon the marriage of another daughter, as to his intention in respect to his future sons-in-law, is not admissible in evidence.
3. When, upon the taking of a deposition, a witness is examined in chief upon matter not admissible in evidence, the opposite party may conditionally cross examine the witness upon the same subject, and if the examination in chief is rejected, the cross examination will share the same fate. The cross examination as to other matters would be admissible.
4. When a commission to take a deposition does not contain the time, and place, at which it is to be taken, but the commissioner sends enclosed with the deposition, a written notice, which does set forth the time and place, and which is attached to the deposition; if he certifies, that pursuant to, or by authority derived from, the enclosed commission, he took the deposition, it will be evidence *prima facie*, that the deposition was taken pursuant to the notice.

Error to the Circuit Court of Dallas.

Detinue for a slave, by the defendant, against the plaintiff in error, and judgment for plaintiff below.

Upon the trial, as appears by the bill of exceptions, the evidence showed, that in August, 1841, the defendant intermarried with the daughter of the plaintiff, and that the negro in question, with two others, were sent by the plaintiff to the defendant's house, in January after, about the time of his first going to house keeping; and the question was, whether this negro was given to the defendant, or his wife, without qualification, or whether it was a loan, with a view to a subsequent settlement of the same, upon the daughter and her issue.

To sustain his cause, the plaintiff was permitted to prove, against the objection of the defendant, that he had not given his two other sons-in-law, any property upon their marriage, but had settled some upon their wives, and their issue. Also,

that the plaintiff at the time of making such settlement, stated his reasons for doing so, and his intention in regard to his other daughters, that it might otherwise be taken for the debts of his sons-in-law, and therefore he did not intend to give any property to his sons-in-law. This was said before the marriage of the defendant, not in his presence, nor was there any evidence that it had ever been communicated to him; to all which the plaintiff excepted.

The defendant showed, by the testimony of the tax collector, that in 1841, when the plaintiff gave in his taxable property, he gave in three negroes less, than he had done the year before, and gave as his reason, that he had given, or let, the defendant have three of his slaves—this was after the marriage, and then offered to prove by the tax collector, that he paid the taxes for the negroes that year; which the Court refused, and he excepted.

The plaintiff offered to read the depositions of certain witnesses, all taken under a commission. The commission did not mention the place, where it was to be executed, but the notice of the time and place of its execution, which was served upon the defendant's counsel, and which was attached to, and returned with the commission, stated, that the commission was to be executed at the house of Mrs. Oliver, in Lowndes county; but there was no evidence, and no certificate of the commissioner, to show where it was executed. The defendant's counsel objected to it for this cause, but the Court overruled the objection, and he excepted.

Plaintiff also offered in evidence the deposition of Francis Powell, the answers to the direct examination, being as follows: "Father said, that he would send the negroes down, but the boy Daniel, he should take back; that he was a family negro, and had a wife at home. He said this to Mr. Olds, in the presence of his wife. I think Mr. Olds said, very well. Father clothed the negroes till they were demanded. *Sister asked mother, if her father was going to make the property over to her. Mother told her, yes. Sister said, very well. Father told sister, that if the girl Susan did not suit her, she could return her and take another girl, Nancy.* I think the negroes were sent to Mr. Olds' four or five months after the marriage. Father said he would purchase other negroes,

and put in the place of those negroes which he intended to entail; he did not intend them as a gift to Mr. Olds. This was the last conversation father had with Mr. Olds, before the negroes were sent. Mr. Olds was not at father's house any more, until after the negroes were sent." The defendant's counsel moved the Court to exclude from the jury, all that portion of the deposition in italics, which the Court refused, and he excepted.

The plaintiff also offered the deposition of Mrs. Gilmer, and on motion of the defendant, the Court rejected the direct examination, except the words, *Mrs. Olds was married in August*, 1840, but admitted the cross examination, to which the defendant excepted.

The deed of settlement from the plaintiff to Mrs. Gilmer and her issue, was in evidence.

Edwards, for the plaintiff in error, contended, that it was not competent to prove the declaration of the father in law, anterior to the alledged gifts, unless such declarations had been made in the presence of the defendant, or communicated to him. [Story on Con. 162; 9 Wheaton, 581; 1 Starkie, 63–4; 2 Id. 223; 1 Nott & McCord, 224; 1 Sewart, 24.]

The deposition was improperly admitted, as the commissioner did not certify when it was taken, and there was no cross examination.

The Court also erred in permitting the cross examination to be read, after the examination in chief had been rejected.

R. Saffold, contra. The declarations of the father, at the time of the gift, were clearly admissible. And for the same reason, any declarations made at, or about that time, were competent evidence, to show the intent of the donor. [1 Nott & McCord, 221; 1 Dev. Eq. 55; 16 Pick. 22.]

The declarations of the father, in regard to his future intentions as to all his sons-in-law, were admissible, as a declaration *ante litem motum*. [11 Pick. 308, 362, 469; 1 Metcalf, 242; 3 Id. 199; 2 N. Car. Reports 432; 5 Carr. & P. 133; 14 S. & R. 275; 5 H. & J. 86–97; 2 Hill's Rep. 248, 257; 2 Spears, 75; 16 Mass. 108.]

The fact, that defendant paid taxes for the property, was correctly excluded, because he was liable for the taxes as

bailee. He further contended, that the deposition was sufficiently authenticated to show, that it had been taken pursuant to the commission, and notice.

ORMOND, J.—When property is sent home with a new married couple, by the parents, it will be presumed to be a gift, unless at the time a less estate is declared. or limited. Whether it be a gift, or mere loan, is a question of intention; any fact therefore, which affords evidence of such intention, is admissible as part of the *res gestæ*.

It is not easy to conceive of any more conclusive mode of ascertaining the intention, than by the declarations of the donor, at, or about the time; and this is not strenuously denied by the counsel for the plaintiff in error, but he insists that the donee is not affected by such declarations limiting the estate, unless made in his presence, or at least, unless a knowledge of them, is brought home to him. This objection, is founded upon a misapprehension of the true nature of such contracts as this.

It is true, that in every contract the assent of the minds of both parties is necessary to its consummation; but in the case of a donation, whether of the entire interest, or of a less estate, the assent of the donee is presumed; as he is the party to be benefited. He is passive, the donor acts; to the acts of the donor we must look therefore, to ascertain its true characacter; and it is wholly unimportant, whether the donee is present, or not, at the time of the declaration, or act, which manifests the character of the donation.

It must be very rare, that in such cases, the real nature of the transaction would not be understood, although there was no actual communication, between the father-in-law, and son-in-law; but if any doubt did exist, it would be the duty of the latter, to inquire and ascertain its nature. [See Banks v. Hatton, 1 Nott & McCord, 221; Nichols v. Edwards, 16 Pick. 62; Collin v. Pope, 1 Dev. Eq. 55.]

It is a cardinal principle of the law of evidence, that the testimony must be confined to the issue between the parties, otherwise it is irrelevant, and may lead the jury astray. Testimony to be admissible, must relate to, and be connected with, the transaction it is offered to elucidate, and this connection

must be immediate, and not remote, or far fetched. Thus, in this case, what the plaintiff said, or did, when he portioned his other daughters, is not competent testimony to establish the true character of this transaction; as the acts were distant from each other, in point of time, and have no necessary connection with each other.

Of the same description, are the declarations of the plaintiff in relation to his future conduct, in regard to the marriage portion of his other daughters. Surely, a more unsafe criterion could not be devised, by which to determine the character of an act, than the declarations of the party as to what it should be, made years before. These were not facts attending, or surrounding the transaction, and were therefore inadmissible as evidence.

There are doubtless, cases, where the declarations of a party made years before the act done, are admitted in evidence to prove the intention of the party to do the act, as in cases of disputed testamentary dispositions. Such evidence is admitted upon a different principle, and is not strictly evidence of the act itself, but to prove, either the capacity, or intention, to do the particular act, from the fact, that an intention to do such act, had been cherished for such a length of time. In such cases there is no controversy about the act itself; here the very fact in dispute, is, what is the true nature of the act. We are therefore clear in the opinion, that the evidence of the previous acts, and declarations of the plaintiff as to his future conduct, anterior to this transaction, and not connected with it, were improperly admitted in evidence.

The fact, that the defendant paid taxes on the slaves, did not tend in the slightest degree, to eviscerate the point in issue, which was not, whether the defendant supposed he was the owner of the slaves, but whether the plaintiff made an absolute, or qualified gift of them, to him or his wife. In addition, the act was equivocal in its nature, as it would have been his duty to pay the taxes, if entitled only to the use of the slaves; the testimony was therefore properly excluded.

We think the Court did not err, in refusing to exclude the direct examination of Mrs. Powell. The reason assigned in the Court below, and here, is, that it does not appear that the defendant was present. We think the fair inference from the

deposition is, that the defendant was present, but whether he was, or was not, the testimony was proper. It consisted of the declarations of the father, as to the interest he intended to give his daughter in the slaves, which, as already stated, was competent testimony, to establish the character of the donation, being made at, or about the time, the negroes were being sent home to the new married couple.

It appears, that from some cause, which is not disclosed, the direct examination of Mrs. Gilmer, a witness for the plaintiff, whose deposition had been taken, was excluded, but the Court permitted the cross examination to be read as evidence. The objection, whatever it was, did not go to the entire deposition, but only to the examination in chief, and we are not able to perceive any good reason for excluding the cross examination. If the examination in chief, was excluded, because the subject matter of the examination was inadmissible, we think the cross examination would share the same fate; otherwise great injustice might be done, as the party against whom the deposition was taken, could not know in advance, whether the examination in chief would be received or not, and might therefore cross examine the witness, conditionally; and so far as he confined himself to the objectionable matter brought out upon the direct examination, he would not be bound by it, if the direct examination was not admitted. We have not sufficient information, from the record, to enable us to determine, whether the Court erred or not, and as the cause must be sent back on another point, it is unimportant, except, as it regards the future action of the Court.

The depositions were also objected to, because it did not appear from the certificate of the commissioner, that they were taken, at the time, and place, at which the opposite party had been notified to attend. The commission, it appears, did not require the deposition to be taken at any particular place, but the notice which pointed out the time and place, was inclosed by the commissioner, and sent with the deposition to the Court. What the precise language of the certificate was, we are not informed. If it certified, that in pursuance to, or by authority derived from, the commission, (to which it appears the notice was attached.) the deposition was taken, we think under the previous decisions of this Court, it would be sufficient evi-

dence, at least *prima facie*, that the deposition was taken according to the notice. This ought to be presumed, until some proof is made creating a doubt of its correctness, when the deposition should be suppressed, unless shown by proof *aliunde* to have been taken at the proper time and place.

For the error of the Court as shown in this opinion, the judgment must be reversed, and the cause remanded.

ROBB v. POWERS, ET AL.

1. It is no sufficient return to a *Ca. Sa.* that the defendant therein, after it was placed in the officers hands, applied for the benefit of the bankrupt act of 1841; and this, although he afterwards obtained a final discharge in due course of proceedings; for *non constat* at the time the execution was returned, that the suit in bankruptcy would be successfully prosecuted.
2. *Quere*—Upon an affidavit of fraud, as required by a statute of this State, cannot a *Ca. Sa.* issue against a certificated bankrupt, and in order to his discharge, is it not necessary that he should have a verdict in his favor, upon an issue of fraud *vel non?*

Writ of error to the County Court of Mobile.

THIS cause was commenced before a justice of the peace and removed by appeal to the County Court. In the County Court a case was agreed and submitted for decision. The facts are these, the plaintiff in error caused a *capias ad satisfaciendum* to be issued by a justice of the peace, against the body of David Jones, for the sum of thirty-five dollars and costs; this execution was founded on a judgment and affidavit, such as the statute requires, is tested the 15th of February, 1843, and was placed in the defendants hands, as a constable, to execute, who made the following return: "The defendant has applied for

the benefit of the bankrupt law." On the 21st of February, 1843, Jones applied for the benefit of the bankrupt law by filing his schedule, &c., in which the plaintiff's claim was embraced. In May, 1843, he was declared a bankrupt, and obtained his final discharge in due course of proceeding.

On these facts, the Court was to render judgment in favor of the plaintiff, for the amount of the execution against Powers and his sureties, if they did not excuse the failure to execute it; otherwise, judgment was to be given for the defendants. The Court adjudged that the constable was justified in the return of the execution, and thereupon rendered a judgment against the plaintiff for costs.

ADAMS, for the plaintiff in error, made the following points: 1. There is no reason assigned for the failure to execute the *ca. sa.* during the six days it was in the constable's hands before Jones' application for the benefit of the bankrupt law. 2. The defendant's became liable immediately upon the return of the execution, and the subsequent discharge of Jones cannot relieve them. [Givens v. Robbins, 5 Ala. Rep. 676; McDougald v. Reid & Talbot, Id. 810.] The liability of an officer for failing to proceed upon an execution, cannot be discharged by the subsequent release of the defendant therein, from his debts as a bankrupt.

No counsel appeared for the defendant.

COLLIER, C. J.—The fact that a defendant has applied for the benefit of the bankrupt law, or been declared a bankrupt, will not authorize the continuance or abatement of a suit pending against him; nor will it warrant a Court issuing an ordinary execution against a party thus situated, in quashing it. The cases cited by the plaintiff's counsel, and a decision at this term, very satisfactorily show such to be the law. It is only after the defendant has obtained his final discharge, that he can thus ask the Court to arrest proceedings against him; for until then, it cannot be known that he will successfully prosecute his suit in bankruptcy.

It may be well questioned whether it is not allowable to sue out a *ca. sa.* upon an affidavit of fraud, even against a certificated bankrupt, and whether, in order to his release, it is not

necessary that he should adopt the course provided by the statute, to try the question of fraud *vel non*. But, be this as it may, it is clear that Jones was liable to arrest on the *ca. sa.*, and that the constable has not excused the performance of his duty.

From this view it results, that the County Court erred; its judgment is consequently reversed and the cause remanded.

HOLLOWAY, ET AL. v. JOHNSON.

1. Where a sole judgment debtor dies before the issuance of any execution, and afterwards a *Fi. Fa.* is issued, it is wholly void, and a sheriff in whose hands it is placed is not liable to a rule for not returning it.

Writ of error to the Circuit Court of Dallas County.

MOTION under the statute, by Johnson v. Holloway, as sheriff of Dallas, for failing to return an execution, *(a fi fa.)* issued at the suit of Johnson against John Holmes, on the 25th November, 1841, for $344 17. Judgment was rendered against Holloway, and also against several others as his sureties of office.

After the plaintiff had proved that the execution had been issued, and placed in the defendant's hands, as sheriff, and that it had not been returned, the defendant offered to show as an excuse for his default, that the defendant in execution died after the rendition of the judgment, and before this execution was issued, and also, that no execution had previously issued thereon. This evidence the Court refused to admit, and rejected. Whereupon the defendant excepted, and now assigns the same

as error. Another question is also raised on the record, relating to a supposed discontinuance, but the opinion of the Court proceeds on the first point only.

EDWARDS, for the plaintiff in error.

No counsel appeared for the defendant in error.

GOLDTHWAITE, J.—The facts offered to be proved by the sheriff, in this case, in our judgment, are a complete answer to the plaintiff's motion. The execution issued after the death of Holmes, was entirely void, and of no more effect than waste paper. There could, by no possible contingency, be any thing, real or personal, upon which the sheriff, by virtue of it, could levy. If the deceased judgment debtor, at the time of his death, owned any real estate, that passed at once to his heirs at law, or devisees; and in like manner his personal estate, if there was any, passed to the person afterwards to be appointed his administrator, or vested in his executor, if he left a will, which afterwards was admitted to probate. In England, cases of this description very rarely occur, because, by the common law, goods were bound from the *teste* of writ, so far as the party and his personal representatives were concerned, and care is generally taken to make the *teste* as of a day previous to the death. [Bragner v. Longwood, 7 Term. 20.] But even then, where a writ is *tested* after the death of the judgment debtor, the execution is irregular, and will be set aside. [Heapy v. Parris, 6 Term. 368.] With us, the statute cuts loose from all the common law doctrine of relation, and directs that writs shall be *tested* the day they are issued, (Clay's Digest, 336, § 128,) except in certain cases, where it is necessary to preserve a lien, (Clay's Digest, 205, § 20; Collingsworth v. Horn, 4 S. & P. 237; Caperton v. Martin, 5 Ala. Rep. 217;) and goods, &c. are bound only from the time that the writ is delivered to the sheriff's hands. [Clay's Dig. 208, § 41.]

In Collingsworth v. Horn, 4 S. & P. 237, it was assumed by this Court, that an execution issued after the death of the defendant would be irregular, unless a lien had attached in consequence of one previously issued. In Fryer v. Dennis, 3 Ala. Rep. 254, an alias execution, where no lien had attached upon the previous one, was quashed as irregular. In Mansony v.

United States Bank, 4 Ala. Rep. 735, it was put as a *query*, whether a *fi. fa.* issued after the death of a joint judgment, debtor, was not void as to his lands, and in Hildreth v. Thompson, 16 Mass. 191, and Stymels v. Brooks, 10 Wend. 206, the law was so held after a full consideration. All these cases recognize the general doctrine, that no execution can issue, where a sole defendant dies after judgment, until the personal representatives, or heirs, or terre-tenants, are brought before the Court by *sci. fa.* These cases are entirely satisfactory to confirm us in the conclusion to which we have arrived.

It will be borne in mind, that the case as presented, is one in which the sheriff could take no action, in any manner whatever, either as to person or property, and that the return of the execution, (if it can be called so,) could affect no one's rights. Under these circumstances, we repeat, that it was no more than waste paper, and the sheriff does not appear as having committed any breach of duty in relation to it, as thus considered.

Judgment reversed and cause remanded.

GODBOLD & ANDRESS, ADM'RS. v. ROBERTS, ADM'R.

1. A plea of set off, to a suit brought by an administrator, is not answered by a replication that the estate has been declared insolvent. If in such a case a balance is found in favor of the defendant, judgment will not be entered against the administrators, but the amount will be certified to the Orphans' Court as a claim against the estate.

Error to the County Court of Monroe.

Debt by the defendant, against the plaintiffs in error, on a promissory note of the defendant's intestate.

Plea, that the plaintiff's intestate was indebted to the intestate of the defendant, in a larger amount than the note sued on.

Replication, that the estate of the plaintiff's intestate had been declared insolvent; to which the defendant demurred. The Court overruled the demurrer, and the defendants failing to plead over, and by leave of the Court withdrawing their plea, thereupon the Court rendered judgment by *nil dicit.*

The defendants prosecute this writ, and assign for error the judgment of the Court on the demurrer to the replication.

BLOUNT, for plaintiffs in error, cited 3 Stewart, 151.

LESLIE, contra.

ORMOND, J.—The case cited is a full authority to the point, that the plea of off set, was not answered by the replication that the estate had been declared insolvent. The counsel for the defendant in error insists that the replication is good, from the consequences which must result from the act of 1843, (Clay's Dig. 195, § 13,) considered in connection with the statute of set off, (Clay's Dig. 338, § 141.) The first cited act, merely declares that no suit shall abate on the plea that the estate has been declared insolvent since the suit was brought, but that the issues shall be tried, and if found against the executor, or administrator, the result shall be certified to the Orphans' Court. The last act authorizes a judgment in favor of the defendant for the excess, when, under the plea of set off, it is found that the plaintiff was indebted to the defendant in a larger sum than the amount sued for. But these statutes do not affect the right of a defendant to plead a set off, although the estate may be declared insolvent. In such a case, if there be an excess found to be due the defendant, over and above the plaintiff's demand, a judgment would not be rendered against the plaintiff, as executor, but against the estate, and the excess would be certified to the Orphans' Court, as a debt due the defendant, from the estate of the plaintiff's testator or intestate.

It results from this view, that the replication was no answer to the plea, and the demurrer to it should have been sustained.

It is now admitted upon the record, by the agreement of both parties, that there are other pleas filed which do not appear upon the record. This, changes, what would otherwise

be the result of the case. We must intend that the pleas withdrawn, were the pleas not demurred to. No other construction can be put upon this general expression, found in the judgment, when considered in connection with the fact, that the defendant declined to plead further, when his demurrer was overruled.

Let the judgment of the Court be reversed, and the cause remanded.

REYNOLDS v. T. & W. DOTHARD, ET AL.

1. A Court of Chancery will not repudiate a bill to enjoin a judgment, because the record of the cause at law discovers an error, for which the judgment is reversible, although the case is one, of which independent of this ground, the jurisdiction of equity is unquestioned.
2. One whose name has been forged as a surety, to a bond for an appeal, on which (by statute) a judgment has been rendered without notice, may go into equity and enjoin the execution, upon the ground that the use of his name was unauthorized.

Appeal from the Court of Chancery, sitting at Talladega.

THE case made by the bill of the plaintiff in error, is substantially as follows, viz: The defendants, T. & W. Dothard, about the first of August, 1840, recovered against their co-defendants, Weir and Adrian, four several judgments for fifty dollars each, before John E. Clark, then a justice of the peace of the county of Randolph; Weir and Adrian executed one appeal bond, in the sum of four hundred and seventy-five dollars, to which the former placed the plaintiff's name as a surety under a pretended authority. The plaintiff denies that

he ever authorized Weir, or any one else to execute the bond, and declares, that he never heard of the same until after the first day of January, 1841; about which time he was informed by the sheriff of Randolph, that he had an execution in his hands against him, for about the sum of two hundred and fifty dollars. The plaintiff then inquired, and was informed, that the four appeal cases had been consolidated, and a judgment for the aggregate sum in controversy, rendered against Weir and Adrian, and himself as their surety, upon the supposition, that the bond to which his name was subscribed was genuine, for the sum of two hundred and thirteen or fourteen dollars, besides costs.

The appeals were taken to the County Court, and the judgment there rendered at the term holden in November, 1840. It is further alledged, that the defendant, Weir, has removed from the United States, leaving no property in this State within the knowledge of the plaintiff; and that the Messrs. Dothard have instructed the sheriff to collect but one half the execution of Adrian, and the remainder of the plaintiff. The bill charges the plaintiff in execution with seeking to oppress the complainant, &c. prays process of subpœna and injunction, which has been awarded accordingly.

The bill was answered by T. & W. Dothard, and Adrian, the latter of whom subjoined a demurrer to his answer for want of equity. Afterwards, a motion was submitted, to dismiss the bill, because it did not disclose a case for equitable relief; whereupon the Chancellor was of opinion, that as to the judgment against the complainant, he had an adequate remedy at law by writ of error, and if an action was brought on the bond he could defend himself under the plea of *non est factum*, and have the assistance of Chancery to obtain a discovery, if necessary. The Chancellor remarked further, that if the cancellation of the bond had been the object of the suit, so as to prevent an action thereon in future, perhaps the bill could be entertained. But as such was not the aspect with which it was framed, the bill was dismissed with costs.

W. W. Morris, for the appellant, made the following points: 1. The Chancellor had no right to inquire what remedy the complainant had on writ of error—it is clear, that the judg-

ment against him is definitive, and the County Court could not vacate it, or give redress by *supersedeas*. 2. The complainant was not bound to know that there was error in the record for which the judgment was reversible; he stated the case for which he said Chancery could give relief, and insisted that the bill was even good in the aspect in which the Chancellor supposed it defective.

W. B. Martin and S. F. Rice, insisted, that the record of the cause at law was made a part of this suit, and the Chancellor might properly refer to it, to ascertain whether the judgment as it respected the complainant was erroneous. If the first ground stated in the decree is maintainable, the second seems to be clear, considering the frame of the bill.

They also contended, that if the bond was a forgery, it would be competent for the County Court to grant a *supersedeas* and quash the execution. If Adrian was able to satisfy the judgment, the complainant was in no danger of irreparable loss; but upon disclaiming it, he might reimburse himself by obtaining a judgment against Adrian.

They cited Quinn, et al. v. Adair, 4 Ala. Rep. 315; Lockhart, et al. v. McElroy, Id. 572; Chandler v. Faulkner, 5 Id. 567; French v. Garner, et al. 7 Porter's Rep. 549.

COLLIER, C. J.—A Court of equity will not grant relief on the ground merely, that the Court of law adjudged a legal defence there set up to be insufficient; if the decision was erroneous the party's remedy is by writ of error. [Moore v. Dial, 3 Stewart's Rep. 155.] Nor will it enjoin a judgment, on the ground, that it would have been revisable if the proper steps had been taken in the Court of law, but by mistake a confession of judgment had been entered. [Farmers' Bank v. Vanmeter, 4 Rand. Rep. 553.] So if a party acquiesces in an erroneous judgment, till it is barred by the statute of limitations, a Court of Equity will not open the judgment, although he was under a mistake as to the law. [Jones v. Watkins, 1 Stew. Rep. 92, et post.]

It is a cardinal rule in respect to proceedings in Chancery, that equity has no jurisdiction to relieve against a judgment, if the defence could have been made at law, and the legal

remedy was unembarrassed. [Moore v. Dial, *supra.*] But we are not aware of any case in which the rule has been carried so far as to repudiate a bill, because the record of the case at law discovered an error, for which the judgment was reversible, although the case stated was one, of which, independent of this ground, the jurisdiction of equity was indisputable. To concede such a power to Chancery would make it a tribunal, not only of original, but revisory jurisdiction. It is certainly the province of that Court, to inquire in every case, whether the complainant had a clear legal remedy, and if he had, whether he is in fault for not availing himself of it. That Court gives relief not only where the defence is purely equitable, but in some cases it recognizes and supports a defence which would have been good at law, if there interposed. Thus, where a judgment is rendered against a party without notice, or as the surety in a bond for an appeal, &c. which he never executed. In Brooks, et al. v. Harrison, 2 Ala. Rep. 209, we held, that although a bond executed for the delivery of property levied on by execution, when returned "forfeited," has the force and effect of a judgment, and execution may issue thereon against the obligors, yet it is competent for one, whose name has been forged as a surety to such bond, to go into equity, and enjoin the execution upon an allegation, that the use of his name was unauthorized. The case of Gibbs & Labuzan v. Frost & Dickinson, 4 Ala. Rep. 720, maintains the jurisdiction of Chancery, in order to relieve the surety in a bond on which a judgment is rendered, or which operates as such *proprio vigore* if the principal is unsuccessful, or fails to perform the condition. The Court there say, if the surety loses any right secured to him by the common law, the statute which declares the bond shall have the force and effect of a judgment, would be unconstitutional.

It might, perhaps be added, if necessary, that the jurisdiction would be defensible upon the ground, that, that Court can afford the speediest redress by settling the rights of the parties in a single suit; whereas, if the course of proceeding indicated by the Chancellor as proper, were adopted, the complainant must first obtain a reversal of the judgment against him, and then defend an action on the bond by showing it to be forgery, as to himself.

We have not thought it necessary to inquire, whether the bond is in such form as authorizes the statute judgment against the appellant. Be this as it may, the bill was improperly dismissed; the decree is therefore reversed, and the cause remanded.

WALLACE v. TAYLOR, ET AL.

1. In a motion by the clerk of the Supreme Court against a sheriff and his sureties for failing to pay over moneys collected upon an execution for costs, issued from the Supreme Court, it is necessary that the notice of the motion should show, that a demand of the money was made of the sheriff, or of the surety sought to be charged.

Writ of error to the Circuit Court of Butler.

Motion, under the statute, by Wallace, as clerk of the Supreme Court, in the name of Arrington, the notice of which issued to J. B. Windham, as sheriff of Butler, and to Taylor, Smith, Womack and Otts, as his sureties, for failing to pay over the amount of a certain *fi. fa.* for costs, issued at the suit of Arrington, against one Jones, and returned satisfied by the said sheriff. Notice of the motion was served upon Taylor and Smith, and as to the others, the notice was returned not found.

Neither in the motion, nor the notice served, is there any averment that the money was ever demanded of the sheriff, or of his sureties. The defendants served with process demurred to the notice of the motion for this reason; and the Court sustained the demurrer, and gave judgment for the defendants. This is now assigned as error.

J. Cochran, for the plaintiff in error, cited Clay's Dig. 311,

§§ 31, 32; Ib. 310 § 24; Hughes v. Hall, 5 Ala. Rep. 63; Clay's Dig. 536, § 14.

Cook, contra.

GOLDTHWAITE, J.—The plaintiff insists that the service of the notice, that a motion would be made, is sufficient, as the duty of the sheriff is to render the money collected to the clerk, by mail. The act of 1839, it is true, makes it the duty of any sheriff, or other officer, having collected money upon an execution for costs, issued from the Supreme Court, to render the same to the clerk, according to the exigencies of the writ; and provides also, that in case he fail to pay the moneys made by him as aforesaid, he and his sureties shall be subject to a judgment, upon motion to the Circuit Court, upon ten days notice. If this enactment was the only one upon the subject, we should be strongly inclined to hold that no demand was necessary, as it was made the duty of the sheriff, &c., to render the money to the clerk, and another section of the same act, where the motion is against the sheriff for not returning, allows him to discharge himself by showing the certificate of the post master, that he deposited the execution, sealed up with the amount of money collected thereon, directed to the clerk, &c. [See Clay's Dig. 310, §§ 22, 23, 24.] But the subsequent act of 1840, in reference to the same subject matter, provides that it shall be lawful for the clerk to commence and prosecute any motion, against any sheriff, for failing to pay over money made on any execution, *on demand made*, under the same rules and regulations as govern motions against such officers when executions issue from the Circuit Courts. [Clay's Dig. 311, § 31.] The legislature has, it seems, by inserting in this enactment the words, *on demand made*, restricted the right of the clerk to move, upon producing the execution returned satisfied, to such cases only, where the failure to pay over the money continues after the demand of it. Whether the demand is to be made of the sheriff personally, in order to render him and all his sureties liable, is a question not raised here, but we consider it quite probable, that such would be its effect. If, as supposed by the argument submitted, the sheriff has absconded, the demand of such sureties as were intended to be charged by the motion, would probably have the effect to render them liable.

Having ascertained that a demand is necessary, before either the sheriff or his sureties can be charged for a failure to pay over money collected upon an execution, it follows that it must be averred, as it is made the condition of the motion. [Barber v. Peck, 1 S. & P. 486; Broughton v. State Bank, 6 Porter, 48.]

Judgment affirmed.

SELMA AND TENNESSEE RAIL ROAD COMPANY v. ROUNTREE.

1. The requisition in the charter of the Selma and Tennessee Rail Road Company, that "five dollars in cash shall be paid on each share, at the time of subscribing," is not a condition precedent to becoming a "subscriber" in the company. And if instead of exacting the money, the commissioners appointed to receive the subscriptions, take a promissory note for the amount, from a subscriber, he cannot after the company is organized, object that he is not a member of the corporation. The amount may therefore be recovered of him, in an action of assumpsit, by the corporation.

Error to the Circuit Court of Dallas.

ASSUMPSIT on a promissory note, made by the defendant, by which he promised to pay "H. Ferguson, Treasurer," one hundred dollars. The defendant pleaded *non assumpsit*, and two special pleas, which need not be set out, as the same questions were presented, by a motion for instructions to the jury.

The plaintiff proved that the note was executed in payment of the first five per cent. due upon the subscription of the defendant, to the stock of the corporation. That the commissioners did not require the five per cent. to be paid in specie, but took the notes of some of the subscribers in lieu thereof. That the sum of five hundred thousand dollars being subscribed, and

notes and money taken to the amount of twenty-five thousand dollars, constituting the five per cent , the commissioners gave public notice, as the charter required, on the 22d February, 1837, and that nine directors were elected by the stockholders, who proceeded to elect their President. That elections for directors were held annually for several succeeding years, and that the company proceeded to construct the road, and make contracts in relation thereto.

The Court charged the jury, that before there could be any legal organization of the company, or the subscribers could become a body corporate, as much as five hundred thousand dollars must have been subscribed to the capital stock, and five per cent thereon paid in, in gold or silver, or its representative; and that the notes of the subscribers, though received and accepted by the commissioners, in lieu of money, was not such a payment as the charter authorized, and that if the company was not so organized, there could have been no consideration for the note given for the first five per cent. on the stock of the defendant.

The plaintiff asked the Court to charge, that if the word treasurer, in the note, was understood, and meant by the maker, to be, the treasurer of the rail road company, that it was *prima facie* evidence of the organization of the company as to this defendant, which the Court refused to give; to all which the plaintiff excepted, and which he now assigns as error.

Edwards, for the plaintiff in error, cited the act of incorporation, Acts of 1836, page 87; 1 Metcalf & P. D. 592, 587; 2 Stewart, 498; 11 Johns. 100; 1 Caine's, 381; Angel & Ames on Cor. 410; 8 S. & R. 219.

Geo. Gayle, contra.

ORMOND, J.—The question upon this record, depends upon the proper construction of the act creating the corporation, and so far as it is necessary to a proper understanding of this question, a brief synopsis of it is as follows:

The first section declares, that a company shall be established for the purpose of erecting a rail road between certain points named in the act, with a capital of $1,200,000, in shares of one hundred dollars each.

The second section relates to the manner of opening the books for subscription to the stock.

The third section—"The subscription for said stock shall be paid as follows, viz: five dollars on each share at the time of subscribing, and the remainder at such times as the directors hereafter mentioned may appoint: *Provided*, that not more than ten per cent. shall be called in at any one time, and twenty days notice given, in some public newspaper, for the payment of each instalment.

The fourth section requires the commissioners "after the sum of five hundred thousand dollars of said stock has been subscribed," to give public notice for the election of nine directors, who were to proceed to elect a President, &c.

The fifth section declares, "that the subscribers to said capital stock, their successoss, &c. shall be, and hereby are, created a body corporate," &c.

The scheme of this act of incorporation is, that the subscribers of stock shall constitute the corporation; but as by the fourth section they were not permitted to organize themselves, until $500,000 in stock was subscribed, it is, in effect, the grant of a charter, when that sum is subscribed, with permission to increase the stock to $1,200,000.

The note upon which this action was brought, was given to the treasurer of the company, for the *five per cent.* which was required to be paid at the time of subscription, and the precise question is, whether the payment of that sum in money, was by the charter made a condition precedent, to any one becoming a "subscriber" in the company.

There can be no doubt, that the Legislature had the power to prescribe the terms, and conditions, upon which the individuals comprising the company, should become invested with the corporate franchise, and our inquiry will be at an end, when we have ascertained the legislative will. The third section of the charter, which is relied on by the defendant's counsel, certainly does not, in terms, require the payment of the five per cent. in money, at the time of subscribing, as a condition precedent to becoming a subscriber. Its object apparently is, to settle definitely when, and at what periods, the whole amount subscribed shall be paid. Five dollars is to be paid at the time of subscribing, and the residue upon the call of the directors;

who, by the proviso, are prohibited from calling for more than ten per cent. at any one time, and required to give twenty days notice, before the payment can be demanded. The obvious design of this section, was to secure the stockholders against improper and unnecessary exactions from the directory; and is in the nature of a contract, between the stockholders and the directors, as to the time of payment of the entire sum subscribed.

Nor can any such condition arise by implication from the nature and object of the corporation. In the case of a private stock bank, it might be quite reasonable to suppose, that the Legislature would desire to guard the public against imposition, by requiring the stock to be paid in, in money, before the company were permitted to exercise their corporate functions, and accordingly, we find in those charters, different language employed. In the charter of the Huntsville Bank, it is required "that the payment of said subscriptions be made, and *completed* by the subscribers, at the times, and in the manner following, to wit." [Toulmin's Dig. 34, § 3.] In the charter of the Tombeckbee Bank, "the money thus subscribed shall be paid, one eighth part thereof at the time of subscribing, &c. each of which payments shall be made in *specie*." [Ib. 40.] In that of the Bank of Mobile, "the payment of the said subscriptions shall be made, and *completed*, by the subscribers, at the times and in the manner following, to wit; one eighth part thereof at the the time of subscribing, &c. each of which payments shall be made in gold or silver, when the directors shall give notice," &c. [Ib. 46, § 3.]

Nothing can be more explicit than these requisitions, or more germain to the matter in hand. But the business of this corporation was not to discount paper, and to circulate its own notes as money, against which there is an express prohibition in the charter; but to make a road, and there does not appear to be any rational purpose to be attained by such a requisition. As the corporation could not construct the road without money, and would not want the money until the road was to be commenced, and as those having the management of its affairs, were best acquainted with its wants, and necessities, the Legislature very properly left the determination of this question with the company itself.

If the construction contended for, be correct, the omission to pay the five per cent. on one share of the $500,000 necessary to be subscribed to enable the company to organize, and exercise its corporate functions, as it would show that the corporation never had a legal existence, would also establish, that all its acts would be invalid. Such consequences as these, it is impossible to suppose that the legislature could have contemplated, as flowing from a direction of the manner in which the stock should be paid.

The fifth section, by which the corporate powers are conferred, declares, that the "*subscribers* to the capital stock," &c. shall be a body corporate, &c., and the only limitation upon this grant, is to be found in the fourth section, which requires $500,000 to be subscribed before the corporate powers shall be exercised.

Such was the decision of the Supreme Court of New York, in the case of the Union Turnpike Co. v. Jenkins, 1 Caine's Rep. 381, which, in principle, cannot be distinguished from this. This decision, it is true, was afterwards reversed in the Court of Errors of that State, (Caine's Cases in Error, 85,) and that decision, as the supreme law of the State, has been followed ever since. We know, that the Court of Errors of that State, is composed of laymen, as well as judges, and cannot, beyond the limits of the State, be considered a higher authority, than that of the Supreme Court.

The question has also arisen in Pennsylvania—Hibernia Turnpike Company v. Henderson, 8 S. & R. 219. In that case, as in this, the action was for the five per cent. to be paid at the time of subscription, but which had not at that time been exacted. The majority of the Court held, that the payment of the five per cent. was a condition precedent to becoming a subscriber, and that the action could not be maintained. The language of the charter, in that case, is materially different from this, and upon that the Court rely as a principal element of the decision, "Provided, always, that every person offering to subscribe in the said books, shall *previously* pay to the attending commissioners, the sum of five dollars, for each and every share to be subscribed." This is certainly much stronger than the provision in this charter, and to say the least, affords strong countenance to the view of the majority of the

Court, that the Legislature intended that the payment of the five per cent. on the sum subscribed, should be a condition precedent to the subscription.

In this case, in our opinion, no part of the charter lends any countenance to the supposition, that it was intended by the Legislature, to make the payment of the five per cent. a condition of the subscription; nor, indeed, would such a requisition have been reasonable, or proper, as it was a matter in which the public had no interest, or concern, and which was therefore, with great propriety, left to the determination of the subscribers, who were to constitute the corporation. By agreeing to receive the promissory note of the defendant in error, they waived their right to demand payment in cash, and could not afterwards have objected, that he was not a member of the corporation—and being entitled to the corporate privileges, he is estopped from denying that he is a member of the corporation.

From this conclusion it results, that the Court erred in its charge to the jury, and its judgment is therefore reversed and the cause remanded.

HARBIN v. KNOX.

1. In appeals from justices of the peace it is not necessary for the parties to make up an issue upon paper, and where the defendant relies on a tender, it is competent for the Court to require him to prove every fact, necessary to make out a plea such formally pleaded. And where in such case the word "tender," is found written in the transcript, but not signed by counsel, it cannot be intended that it was received by the plaintiff as a plea, and thus preclude him from insisting at the trial that the money was not in Court.
2. *Quere?*—Is a justice of the peace previous to the institution of a suit, such an agent *virtute officii*, as is authorized to receive money of a debtor on a claim placed in his hands to be sued.

Writ of error to the County Court of Lowndes.

THIS cause originated before a justice of the peace at the instance of the defendant in error; a judgment being rendered in his favor, the case was removed to the County Court, where there was a similar result.

The amount in controversy being under twenty dollars, the cause was tried by the Court without the intervention of a jury. The case made by a bill of exceptions may be thus stated, viz: the defendant proved, that while the account was in the hands of the justice of the peace, who had received it for collection from the plaintiff, and before he had sued thereon, he (the defendant,) tendered to the justice, in Alabama bank bills, the amount of the claim, and no objection was made to the bills. The defendant prayed the Court to exclude the evidence, on the ground, that the money was not brought into Court; and the evidence was excluded because the tender to the justice was not sufficient. Whereupon a judgment was rendered against the defendant below for the amount appearing to be due with costs.

STONE, for the plaintiff in error, cited, 1 Wheaton's Selw. 139, 140; Paley on Agency, 289; 3 Starkie's Ev. 1394; 3 T. Rep. 554; Minor's Rep. 201, and insisted, that the justice of the peace was an agent to whom a payment or tender could be made; that a tender in bank bills, if not objected to, is good, and it could not be urged on the trial, that the money was not in Court. Such an objection, then, comes too late.

N. COOK, for the defendant, argued, that a tender could not be supported, unless the money was in Court before, or at least at the time of the trial. [Eddy v. O'Hara, 14 Wend. Rep. 221.]

COLLIER, C. J.—In appeals from justices of the peace where the amount in controversy does not exceed twenty dollars, it has been repeatedly held that it is not necessary for the parties to make up an issue upon paper; but the complaint and answer may be stated orally, and developed by the proofs. And in all appeals from that jurisdiction the Court before whom the same is brought shall proceed to try the case according to the justice and equity thereof. [Clay's Dig. 314,

§ 10; 315, § 12.] In the present case, it was clearly competent for the County Court to have required the defendant, to prove every thing that was necessary, to constitute a good plea of tender. It cannot be supposed that the defendant must be intended to have replied to the word "tender," which appears written in the transcript. It is not signed by counsel so as to indicate that it is a plea, and if it were, it could not be thus dignified, as there was not, nor could be, with propriety, a statement to which a plea was necessary. There is, then, no pretence for the argument, that by going to trial, the plaintiff waived the right to require the production of the money. The proof that it was in Court, was an essential constituent of the defence, and if not made, the defence would be incomplete.

But conceding, that a tender, with a continued readiness and profert of the money was shown, and might it not then be objected, that a justice of the peace before suit brought, is not such an agent *virtute officii*, as is authorized to receive money of a debtor on a claim placed in his hands to be sued? Would the sureties of the justice be liable on his official bond for money thus collected? If not, the receipt of money under such circumstances would not be as an officer, but as a private individual; and to make him an agent for one who had engaged his official services, with powers beyond those conferred by the law, a delegation of authority should be shown. It is needless to consider this question further, as the view taken of the first point shows, that the judgment of the County Court must be affirmed.

WAGNER & HUGHES v. CHENAULT.

1. When the plaintiff styles himself to be sheriff and *ex officio* administrator of the estate of one deceased, and sues on a note payable to another person as administrator *ex officio*, of the same intestate, and the declaration alledges that the term of office of the payee having expired, the plaintiff was duly appointed *ex officio* administrator *de bonis non*, upon error, after a judgment by default, the title of the plaintiff to sue on the note must be considered as sufficiently stated.

Writ of error to the Circuit Court of Cherokee.

ACTION of assumpsit by Chenault against Wagner and Hughes, as the makers of a promissory note, payable to Elbert L. Gibson, administrator *ex officio*, of the estate of Peter Wagner, deceased. The declaration describes the plaintiff as sheriff of St. Clair county, in this State, *ex officio* administrator of the estate of Peter Wagner, deceased, successor to Elbert L. Gibson, late *ex officio* administrator of said estate; and upon setting out the making of the note by the defendants to the effect above stated, proceeds thus: "and the term of office of said Gibson having expired according to law, the said plaintiff, sheriff of said county of St. Clair, was, on the 2d day of October, 1843, by the Judge of the County Court of that county, duly appointed *ex officio* administrator *de bonis non* of the said estate of the said Peter Wagner, deceased. Whereby," &c.

The defendants having failed to appear, judgment by default was rendered against them.

They now assign that this judgment is erroneous, because—

1. There was no writ of inquiry, as to the amount of damages.

2. The declaration discloses no title in the plaintiff, and is insufficient.

W. B. MARTIN, for the plaintiff in error, insisted, that Chenault can maintain no action in his own name on this note, but should have sued in that of Gibson, to his use.

If the action can be maintained by Chenault, then the record ought to show that his letters of administration were produced to the Court.

S. F. RICE, contra.

GOLDTHWAITE, J.—We are inclined to think this declaration must be considered as presenting a substantial cause of action, though it certainly is defective in clearness, as to the statement of the plaintiff's title. The note is payable to Gibson, administrator *ex officio* of the estate of Wagner, deceased, and if the suit was by him in his representative character, no *profert* of his letters of administration would be necessary, or could be required, as the defendants by their contract have ad-

mitted him to possess that character. [Caller v. Dade, Minor, 20; Harbin v. Levi, 6 Ala. Rep. 399.] The note as an admission shows also, that he was administrator *ex officio*, and such an administration by our statutes can only be imposed on a sheriff or coroner, and ceases by the terms of the act, with the official term of the individual upon whom it is imposed. [Clay's Dig. 222, § 10.] It is alledged, that the official term of Gibson had expired according to law, and that the plaintiff was duly appointed administrator *ex officio de bonis non* of the same estaet. This, in connection with the description at the commencement of the declaration, that he is sheriff of St. Clair county, is sufficient to show, that he is administrator by virtue of his office as sheriff, and that he has lawfully succeeded Gibson in that function. This brings the declaration within repeated decisions of this Court, that where a note or contract is made with one as administrator, it passes by operation of law to a subsequent administrator. [Allen v. Boykin, 206; King v. Green, 2 Stew. 133; King v. Griffin, 6 Ala. Rep. 387; Harbin v. Levi, Ib. 399; Green v. Foley, 2 S. & P. 450.]

The view we have taken disposes of the case, as it does not seem to be seriously urged, that the Court should of its own mere motion, inspect the letters of administration.

Judgment affirmed.

WALKER v. DRIVER.

1. When parties make a settlement of their accounts, and reduce it to writing, the written instrument is the highest evidence of the fact.
2. When a settlement of accounts is made and reduced to writing upon the back of another instrument, to which the settlement refers, such reference authorizes the party against whom the settlement is read, to read such instrument, to control or explain it. Proof of the execution of the instrument, is not necessary, to authorize the introduction of the settlement in evidence.

3. When upon the settlement of an account, one of the parties, admits certain judgments, which the other had obtained against a third person to be included as a charge against him, such person may be called to prove that no such judgments existed, but he cannot impeach their correctness, by proving that the debt on which they were founded, was unjust, or never had an existence.
4. A settlement made and balance struck, is *prima facie* binding, until impeached for mistake or fraud, which the party alledging must prove.
5. It is competent for a party relying on a stated account, to introduce the person who made it, to prove, that it was made upon items admitted by the parties.

Error to the Circuit Court of Talladega.

ASSUMPSIT on promissory note, by defendant against plaintiff in error. Pleas—non-assumpsit, payment, set off, and accord and satisfaction.

Upon the trial, the plaintiff read the note sued on to the jury, which was dated 17th May, 1838, for the payment of $488, payable the 25th September, after the date, and was executed by the defendant, by David S. Walker as his agent.

The defendant then proved by one Barclay, that before the institution of this suit, he heard a conversation between plaintiff and defendant, in which it was admitted by plaintiff, that defendant had transferred him a note for about $700, on one Ice, which plaintiff was to collect, and to apply to the payment of the note sued on; and in a subsequent conversation, before this suit was brought, he heard plaintiff admit, that he had collected the note by process of law. David S. Walker swore, that he never had been indebted to plaintiff.

The plaintiff then introduced one Townsend as a witness, who testified that on the 7th October, 1841, the plaintiff and defendant had a settlement before him, and that he was selected to make the calculation and settlement. He further proved, that the parties stated over and acknowledged items in his presence, upon which he proceeded to calculate, and make a settlement. A paper was produced in this form: "I have this day handed to David Walker the four small notes mentioned within, which amount to two hundred and forty-six dollars and seventy cents. I have also, this day, given him a credit of three hundred and fifty-three dollars and twenty-three cents, which two amounts, make the amount of six hundred dollars, which I have received on this order. ELI M. DRIVER.

Witness proved that this paper was made in his presence,

and was the settlement he then made, that it was read over to defendant, and admitted by him to be correct. He also testified, that in making said settlement, some judgments upon the docket of witness, who was a justice of the peace, in favor of plaintiff, and against David S. Walker, were admitted by defendant, and were included in the calculation, and in part produced the result, stated in said paper. The witness only spoke of them as items stated by the parties, and in part the basis of his calculations. There was no proof given of their amount, nor was the docket produced. There was a credit on the note sued on, in the hand-writing of the witness, which he swore was entered there by him, at the time of the settlement. It corresponded with the paper above copied, and the witness testified that the credit on the note, and the above paper related to the same transaction. He also testified, that David Walker had consented, that the judgments against David S. Walker, should be included in the settlement, and deducted from the amount collected by the plaintiff from Ice.

The instrument copied above, was indorsed on another paper, to which there was a subscribing witness. That paper was not proved, or offered to be read to the jury.

The defendant objected to the proof by Townsend, and of all proof of a settlement, except that contained in the written settlement before copied. He objected to proof of the judgments, because the docket was not produced. He also objected to the reading of the paper above spoken of, because of its irrelevancy, and because the paper on which it was written, had a subscribing witness, who was not produced.

The Court overruled all these objections, and permitted the witness to detail the conversation of the parties, at the time of the settlement, and to state the items introduced in his calculation, by consent of the parties, and permitted the paper to be read in evidence. To all which the defendant excepted, and which he now assigns as error.

W. P. Chilton and Bowdon, for the plaintiff in error.

Rice, contra.

ORMOND, J.—To repel the presumption of payment of the debt in suit, the plaintiff, it appears, relied upon a settlement

made between him and the defendant, accounting for the moneys in his hands, and giving him credit for the balance upon the note in suit. Upon this accounting, it appears, that the result was reduced to writing, and being proved by the person who, at the instance of the parties, stated it, the paper was admitted in evidence. This we think was entirely proper, it was the highest and best evidence of the fact.

This settlement was written upon the back of another instrument, to which it refers, and with which it appears to have some connection, though to what extent does not distinctly appear. It was objected that the plaintiff could not read the settlement, without first proving the instrument on the back of which it was written. The reverse of this appears to us to be the true rule, and that the reference in the settlement to the order written on the other side, made that, evidence, at least for the defendant, if he thought proper to use it. The settlement of the accounts was a distinct fact, which the plaintiff had the right to prove, and if that was connected with, or in any manner controlled by, the paper on which it was written, it was for the defendant to insist on it.

We do not understand that the witness who was called to prove the settlement, undertook to state the items of which it was composed, so as to show its correctness; but that he stated that the result of the settlement was obtained by each party stating the items of his account, and that from the admissions of each party, the settlement was made. That among the items of charge of the plaintiff, were certain judgments obtained by the plaintiff before a justice of the peace, against one David S. Walker, which the defendant admitted. To all this we can see no objection. We do not understand that the witness was permitted to prove the existence, or the amount of these judgments, but merely, that there were such items of charge in the plaintiff's account, against the defendant, admitted by the latter to be correct.

The effort on the part of the defendant appears to have been, to falsify the settlement between him and the plaintiff, and for that purpose he called David S. Walker, who proved, that he had never been indebted to the plaintiff. The account stated between the plaintiff and defendant, was binding *prima facie* on both parties, until it was shown to be incorrect. If the wit-

ness had proved that no such judgments existed, as were included in the settlement with the defendant, it would have been necessary for the plaintiff, to sustain these items of charge, by proving their existence. It was not necessary that he should produce and prove the judgments, because, so far as we can judge from the record, the fact that they existed was not disputed. The attempt appears to have been to go behind the judgments, and to prove that they were not founded on subsisting debts; but it is very clear that they could not be thus collaterally impeached.

In Langdon v. Roane's adm'r, 6th Ala. Rep. 518, this Court had occasion to consider the effect of an account stated, and it is there said, that where parties have settled their accounts, and struck a balance, it is incumbent on the party alledging fraud, or mistake, to establish it by proof; see the case, and the numerous authorities there cited.

We are unable to perceive any error in the judgment of the Court, and it is therefore affirmed.

COOK & LAMKIN v. BLOODGOOD, USE, &c.

1. A declaration in an action against an attorney, charging a neglect of professional duty, or even impropriety of conduct, if it set out an undertaking by the defendant to collect money, and alledge a promise to make good the loss resulting from the breach thereof, is a declaration in *assumpsit*.
2. *Semble*—If one of the attorneys, who are practising law in partnership, receive his own notes of a debtor against whom the firm are intrusted with a demand for collection, in satisfaction thereof, he will be liable to his copartner for any injury he may sustain as a consequence of the act.
3. In professional partnerships formed for the practice of the law, if one member of the concern acknowledges the receipt of money for a client, the latter need not inquire how the claim was collected, or whether paid at all, or not, but may charge the firm upon the assumption that the receipt expresses the truth; and the partner who had no agency in giving the receipt cannot gainsay its truth.

4. An attorney is not authorized to receive his own or any other person's note in payment of a debt placed in his hands for collection; and if notes are received by a sheriff in satisfaction of an execution, either with or without the direction of the attorney, the return may be vacated on motion, and another execution issue. *And semble*—if the notes were received without the attorneys approbation, the sheriff would be liable, if with it, then the attorney would be liable: either of these remedies the creditor may pursue according to the facts.
5. *Semble*—Where an attorney is subjected to damages in consequence of the neglect, or improper conduct of his copartner, in the collection of a debt due by judgment, he will be remitted to the remedy by execution, to which the plaintiff was entitled.

Writ of error to the Circuit Court of Lowndes.

This was an action of assumpsit at the suit of the defendant in error against the plaintiffs, for money had and received, for neglect as attorneys in not collecting a note placed in their hands for collection, for discharging and acquitting the parties thereto from its payment, &c. The cause was tried by a jury, who returned a verdict for the plaintiff, on which judgment was rendered.

On the trial the defendants excepted to the ruling of the Court. From the bill of exceptions, it appears, that the defendants had obtained a judgment as partners in the practice of the law, in favor of the plaintiff, against Harrison and others for the sum of ———, that execution issued thereon, and had been returned "satisfied;" that the sum of ——— had been received of the sheriff in money, and paid over to the plaintiff on demand. The residue of the sum due on the execution, was received from the sheriff in Lamkin's individual notes, and a receipt given by the latter in the joint names of the defendants. Mrs. Harrison, one of the parties to that judgment, was still solvent.

The defendant Cook, prayed the Court to charge the jury as follows: 1. That a professional partnership did not authorize Lamkin to receive from the defendant his individual notes, as payment of a debt due a client, of the defendant's, and that such an act of Lamkin, did not make Cook liable as a partner for money had and received. 2. That to render Cook liable under the count, for money had and received, the jury must believe that money had been received by himself, or Lamkin, as partners, and that a receipt by the latter, of his individual notes, would not charge Cook for money had and received. Both these charges were refused.

E. W. Hayne and J. A. Elmore, for the plaintiffs in error, made the following points: 1. The counts which charge negligence and a consequential loss, are in case, and improperly joined with counts in assumpsit: there is then, a misjoinder of causes of action, which is available on motion in arrest of judgment; and this motion, it is admitted, was made in the Circuit Court. 2. The reception of notes in discharge of the judgment, will not support an action for money had and received. 3. Lamkin transcended his powers as a partner, in receiving his own notes for a demand placed in the hands of himself and copartner to collect; and Cook cannot be charged with the amount of these notes as cash. [Gullett v. Lewis, 3 Stew. Rep. 22; Kirk v. Glover, 5 Stewart and Porter Rep. 340.]

Gilchrist, for the defendant in error, insisted, that there was no misjoinder of causes of action—an attorney may be sued in assumpsit for neglect. [Mardis' adm'r. v. Shackleford, 4 Ala. Rep. 493.] The defendants received the notes of Lamkin as money, in satisfaction of the plaintiff's execution, and as against plaintiff, cannot object that it was satisfied with something else than money. [1 Wheat. Selw. 90–91; Randall v. Rich, 11 Mass. Rep. 494.]

COLLIER, C. J.—It is clear, that all the counts in the declaration are in assumpsit. True, some of them may attribute neglect of professional duty, or even impropriety of conduct, yet they all set out the defendant's undertaking to collect the money, and alledge a promise to make good the loss resulting from a breach of their undertaking. Mardis' admr's v. Shackleford, (4 Ala. Rep. 493,) is a decisive authority on this point.

There can be no question but Lamkin transcended his powers in receiving his own notes in satisfaction of the plaintiff's execution against Harrison and others, and that he is liable to Cook for any injury he may sustain as a consequence of that act. [Story on Partn. 264–5; Smith v. Loring, 2 Ohio Rep. 440.] But it does not follow from this admission, that both the defendants are not liable to the plaintiff. It is stated as a general rule, that where the creditor *of one* of a firm, takes a note in the name of the partnership, the company are not bound to pay it, unless it passes into the hands of a *bona fide*

holder. [Lansing v. Gaine & Ten Eyck, 2 Johns. Rep. 300; New York F. Ins. Co. v. Bennett, 5 Cow. Rep. 574; Leroy v. Johnson, 2 Peter's Rep. 199.]

It has been held, that one partner alone, may release, or even compound, or compromise a partnership demand; that as a debtor may lawfully pay his debt to one of them, he ought also, be able to obtain a discharge upon due payment. Further, that as the release operates against the partner himself, and no suit could be brought for the debt without uniting him as a plaintiff, the release of one plaintiff would necessarily bar the action as to the other. [Story on Partn. 171–2.]

Thus, we see, that an act of one partner which would be invalid *inter se*, may be operative and effectual in respect to third persons. This is a most salutary rule, and clearly defensible in morals. If the law were otherwise, it would require great caution in many cases, in ascertaining whether a person would be safe in transacting business with one partner, on account of the firm.

The admission of one partner within the scope of the partnership, and relating to its business, are obligatory upon the firm; for every partner is an agent of the firm, and virtually embraces the character both of principal and agent; and his rights, powers, duties, and obligations, it is said, are in may respects governed by the same rules and principles as those of an agent. [Story on Partn.] It results from these principles, that the admissions of a partner, as it respects persons dealing *bona fide* with the company, are in legal effect the admissions of the firm.

In professional partnerships, formed for the practice of the law, if one member of the concern acknowledges the receipt of money for a client, the latter need not inquire how the claim was collected, or whether paid at all, or not; but may charge the firm upon the assumption, that the receipt expresses the truth. And in such case, the partner who had no positive agency in giving the receipt, cannot gainsay its truth. It is stated as an established principle, that where an admission is made by a party, which, if true, entitles another to an action against him, if he bring suit, he shall be bound, whether he spoke true or false. Hall, et ux. v. White, 3 Carr. & P. Rep. 242, is a strong case on this point. That was an action

of detinue for deeds and writings. The evidence was, that the defendant wrote to the plaintiff concerning a proposed interview on the subject. "I have no objection to submit the deeds to Mr. Watson's perusal, nor to his taking extracts." Another letter prescribed conditions, and said the deeds would not be forthcoming unless the conditions were complied with. Best, Ch. J. remarked, "If the defendant said that he had the deeds and thereby induced the plaintiffs to bring their action against him, I shall hold, that they may recover against him, although the assertion was a fraud on his part. It appears by his letter, that he did say so; and therefore, I am of opinion, that the verdict must be for the plaintiff." So in Den ex. dem. Mordecai's heirs v. Oliver, 3 Hawks. Rep. 479, a defendant in ejectment in a conversation before suit brought, with a view to being made a defendant, and trying the title, declared that he was in possession; and the action was thereupon brought against him: Held, that he has concluded, though in truth he was not in possession. And Lord Kenyon ruled, that the defendant was concluded by his admission, and could not show that he was mistaken; for whether the misrepresentation was unintentional or designed, it had equally the effect of inducing the plaintiff to sue. [Doe, ex. dem. Eyre v. Lambly, 2 Esp. Rep. 635.] Many other cases to the same effect are collected by the learned annotators upon Phillips on Ev. 2 Vol. 205–6, et post.

This view is decisive to show, that the receipt of Lamkin to the sheriff, as it respects the plaintiff, is conclusive upon Cook; and that the latter cannot be permitted to show that the receipt was gived for Lamkin's individual notes.

The cases of Gullett v. Lewis, and Kirk v. Glover, maintain, that a satisfaction of the execution by Lamkin's notes, is not such a payment as the plaintiff is bound to recognize; and if he had so elected, he might have proceeded against the sheriff and made the money of him; unless the sheriff received the notes of the defendants in execution by Lamkin's directions or consent. If the notes of Lamkin were received by the sheriff either with, or without Lamkin's approbation, the execution was not satisfied *pro tanto*, and the return of the sheriff thus far, might be vacated on motion, and another execution awarded. The plaintiff, we say, would be entitled to

either of these remedies according to the facts. If then, Cook, an innocent party, is compelled to pay the plaintiff his demand to an amount equal to the notes received by Lamkin, he must be remitted to all the remedies which the plaintiff had for its collection, that he may reimburse himself. This conclusion rests on such obvious principles of equity, and legal analogies so well established, that it is unnecessary to support it by authorities, or illustrate it by reasoning.

It results from what has been said, that the judgment of the Circuit Court must be affirmed.

HARVEY v. JETER, ET AL.

1. In the statutory action of detinue when the plaintiff consents to a nonsuit, if a judgment for costs is entered against his surety, as well as himself, it will be considered as a clerical misprision, and may be corrected at a subsequent term, on motion of the defendants: but if such a judgment was ordered on due consideration, although it is irregular for one judge to correct the errors of another, the plaintiff could not be heard to assign error, as no injury has resulted to him from the amendment.

Writ of error to the Circuit Court of Shelby.

Harvey was the plaintiff in action of detinue, commenced against Cornelius and J. W. Jeter, and Thomas Harvey, in which he entered into the statutory bond, with Ashley Parker as his surety, conditioned to pay the defendants all such costs and damages as they might sustain, by the wrongful suing out of the writ in that action. At the fall term for the year 1842, Harvey consented to become *nonsuit*, and thereupon a judgment was entered against him, and also against Parker as his surety, for the costs of suit. At the spring term, 1844, the defendants moved to amend the judgment thus rendered, so as to make it against Harvey only, and the Court so amended it,

upon the production of the original papers in the suit, considering the previous judgment as incorrect.

Harvey opposed the amendment, and excepted to the decision of the Court allowing it. This amendment is now assigned as error.

PECK & L. CLARK, for the plaintiff in error, insisted that the first judgment was the consideration of the Court upon the bond, and that the error could not be corrected at a subsequent term. [Allen v. Bradford, 3 Ala. Rep. 281; Bentley v. Wright, Ib. 607.]

B. F. PORTER, contra, submitted that the cases cited by the plaintiff, were direct in favor of the defendant.

GOLDTHWAITE, J.—We think the presumption of law is, that a judgment, such as the one first rendered in this case, is a mere clerical misprision, which may at any time be amended. It is not the case where an erroneous judgment is given on a defective statutory bond, as it was in Quinn v. Adair, 4 Ala. Rep. 315; but in the statutory action of detinue, no judgment is rendered upon the bond, when the suit is disposed of against the plaintiff. The *prima facie* intendment is, that the Court directed the proper judgment in this case, against the plaintiff only, and that the clerk, without authority from the Court, or statute, entered it against the surety, as well as the principal. The correction of this, at a subsequent term, was entirely proper, but if the judgment had been rendered upon due consideration, by the Court itself, although it cannot be held that one judge may thus correct the errors of another, yet, even if that was the case here, the plaintiff would not be permitted to assign error, as no injury can arise to him from the error committed.

Under either view, the judgment must be affirmed.

A. POPE & SON, ET ALS. v. WILSON, ET ALS.

1. One, unembarrassed, may make what disposition he pleases of his property; therefore a deed of trust, or mortgage, which does not show upon its face that it was made in contemplation of insolvency, or that there are other creditors who may be prejudiced by it, cannot be considered fraudulent *per se*.
2. To justify a Court in inferring that a deed was made with fraudulent intentions, where no fraud in fact is proved, two things at least must concur—there must be creditors known to the parties who may by the provisions of the deed be delayed, or hindered, in the collection of their debts, and the necessary consequence of the deed, must be, to produce such delay, or hinderance.
3. When a deed of trust, fairly made, becomes, by subsequent events, oppressive, or injurious, to other creditors, although such a condition of things would not affect the deed, which was valid at its inception, yet a Court of Chancery would direct the trust to be executed immediately, and after satisfying the purposes of the trust, pay over the residue to the other creditors.

Error to the Circuit Court of Lowndes.

The bill was filed by the plaintiff in error, Wilson, as trustee in a deed made by William J. Alexander, to secure the payment of a debt to John Irwin. Pope and Son, having obtained judgment against Alexander, and levied their execution on a portion of the slaves conveyed by the deed, and Desha, Sheppard & Co. having also attached certain of the slaves, for a debt due them from Alexander, the complainant filed his bill for an injunction. The deed, which is made an exhibit to the bill, was executed on the 4th February, 1841, by which Alexander conveys to the trustee, a tract of land, and a number of slaves, upon the following conditions: "Whereas, the said Alexander hath borrowed from John Irwin, of the county of Mecklenburg, the sum of twenty-four thousand five hundred dollars, to be paid in five years, from the 1st March, 1841, and it being understood, and agreed, by the said Irwin, and the said Alexander, that the net proceeds arising from said plantation and negroes, shall be applied, on or before the 1st of March, in each and every year thereafter, until the close of said term of five years, towards the payment and discharge of the said

sum, and the annual interest thereon. Now, if the proceeds so arising, shall not be sufficient for that purpose, and the aforesaid debt and interest shall not otherwise be discharged, then it shall be the duty of the said Wilson, after due notice and advertisement, to expose so much of said property as may be necessary to discharge said debt, or any portion thereof that may be then due, at public sale, for cash, or otherwise, as may be deemed expedient. And in case the said debt shall be discharged by the proceeds, or otherwise, then, the said Wilson doth contract to re-convey, &c. And it is further understood, and agreed, that the said Alexander is to remain in the possession of the above property, and to have the management thereof, the more effectually to discharge the purposes of this conveyance," &c.

On the 21st March, 1842, another deed was executed between the same parties, explanatory of the former, which, after reciting its material provisions, proceeds: "Now, therefore, to declare more explicitly the said intention, be it remembered, that the said W. J. Alexander, by this indenture, for and in consideration of five dollars, in hand paid, by the said Wilson, hereby conveys to him, in trust, the several crops hereafter to be produced upon the plantation, and by the negroes conveyed by the said before mentioned deed of trust, until the debt due to the said Irwin is entirely discharged, to be applied on or before the 1st of March, in each and every year; first deducting all expenses attending the said farm and plantation. And this conveyance, is not intended to interfere with the provisions of the deed heretofore made, but to confirm and explain the same." The deed then conveys to the trustee all the horses, cattle, hogs, plantation tools, and stock of every kind, not conveyed by the former deed.

In the month of March, 1841, Alexander also executed a deed to one Thomas C. Evans, in trust, to secure a debt due to James Martin, by which deed all the property conveyed by the first deed, was conveyed in trust to pay the debt due to Martin, subject to the previous conveyance to Wilson, for the benefit of Irwin. These deeds were all recorded.

Pope & Son, and Desha, Sheppard & Co., answer the bill, and charge fraud in fact, and insist that the deed is fraudulent on its face. Martin also answered the bill, and filed a cross

bill for the protection of his interest. Testimony was taken on both sides, and the cause was tried on the bill, answers, and proof.

The Chancellor, considering that the deed was not fraudulent, but fair and *bona fide*, decreed that sale be made of the property for the payment of the instalments then due, and that the trust stand as a security for the residue. That the trust in favor of Martin, should stand as a security for his debt after discharging the debt due Irwin, and that the execution and attachments against the property be perpetually enjoined.

From this decree this writ is prosecuted.

Hopkins and Dargan for the plaintiff in error, insisted—

1. That the bill was multifarious because there was no community of interest between the defendants.

2. That the creditors had the right to sell the possessory interest of the mortgagor, and that this right could not be restrained in equity.

3. That the deed was void upon its face, because it reserved a substantial benefit to the grantor, in the control and management of the property. From its tendency to injure the other creditors, by the power given to the grantor over the avails of the property. That the object of the deed was not to devote the property to sale, that from the proceeds the debt to Irwin might be paid, but to prevent a sale long enough to enable the debtor, by the use of the property, to pay the debt. That if it could be thus tied up for five years, it might be for any longer period, and thus give the debtor the use of his property in defiance of all but the preferred creditor.

They also insisted that the deed in favor of Martin, being subject to, and recognizing the previous deed, must abide its fate.

In support of these propositions they cited, 4 Ala. Rep. 374; 11 Wendell, 200; 31 Eng. C. L. 254; 14 Johns. 464; 1 Iredell, 180, 490; 4 Dallas, 88, 90; 5 Porter, 182; 12 S. & R. 198.

Thos. Williams, contra.

The Court declined delivering any opinion in the cause, intimating that they considered the case to be covered by the decision in Elmes v. Sutherland, *supra*.

At the January term, 1845, the cause was reargued.

HOPKINS, for plaintiff in error.

THOS. WILLIAMS, contra.

ORMOND, J.—This cause was argued at the last term, and held under advisement. No opinion was delivered at this term, because we considered the case to be covered by the decision pronounced at the present term, in the case of Elmes v. Sutherland.

The argument at the present term, has been made both upon the deed itself, and as considered in connection with the testimony.

In the case of Elmes v. Sutherland, it was held, that a trust deed made by a debtor to secure the payment of a debt, and postponing the payment of the debt to a period subsequent to the time when it fell due, reserving to the grantor the possession and use of the property conveyed, until that period, was not materially different from a mortgage made under the same circumstances—and, that if it did not appear in the deed, that the debtor was in failing circumstances, the stipulation that he should retain the possession, and use of the property, would not *per se*, make the deed void. Further, that, as by the terms of the deed, the payment of the debt secured by it, was postponed to a period beyond its maturity, the assent of a creditor, not a party to it, would not be presumed, and that until he did assent, the deed gave to the trustee a mere power revocable by the debtor.

At the first hearing of this cause, the argument of the counsel for the plaintiff in error, was mainly directed to show that this deed was void upon its face, as showing an intent to hinder and delay creditors. The deed discloses, that Alexander was indebted to Irwin in the sum of twenty-four thousand five hundred dollars, payable in five years; that to secure the payment of this money, he conveyed to the trustee named in the deed, certain lands and slaves, the net proceeds arising therefrom, to be applied, on or before the first of March, in each year, towards the payment of the debt and interest, and for any portion of the debt remaining due at the expiration of the five years, the property to be sold by the trustee. It was also

agreed, that Alexander should remain in the possession of the property, and have the management thereof, the more effectually to enable him to discharge the purposes of the trust.

As a general rule, the right of every one to dispose of his property, as his pleasure, interest, or even caprice, may dictate, is unquestionable. The power of Courts of justice to interfere with, or in any manner to control such disposition, exists only, when this right is exerted to the prejudice of third persons. If by such a disposition of the property, the creditors of the grantor are defrauded, delayed, or hindered of their just rights, then, and not till then, the power exists in Courts of justice to interpose, and to give the property its proper destination. Now, it does not appear on the face of this deed, that Alexander had a creditor in the world, or that he owed a debt beside the one he was then providing for; how then can it be inferred from the deed, that there was an intention to hinder and delay creditors. As every man is presumed to intend the natural and necessary consequences of his acts, Courts will presume the intention to exist, when the consequence must naturally follow, and will not listen to an averment against it. Such was the case of Gazzam v. Poyntz, 4 Ala. Rep. 374. There, the Court held the deed to be fraudulent, and void, because the intent was apparent on the deed, to delay and hinder creditors, although both the maker of the deed, and the trustee, in their answers, declared that no such intention was entertained; but that the objectionable feature of the deed, was introduced for the *benefit* of creditors, and there was no proof to the contrary. It is self-evident, that where there are no creditors, there can be no intention to defraud them, and as we are now sitting in judgment on the deed itself, it must be tried by its own stipulations, and declarations, and, so considered, it is such a deed as any one in the community has a right to make, or to accept.

It is further urged that it does not appear from the allegations of the bill, that Irwin assented to the deed when it was made; and that as the payments of the debt provided for in the deed, are not so favorable to the complainant, as the contract recited in the bill, upon the authority of Elmes v. Sutherland, no such assent can be presumed; and although there is proof of such assent, it cannot be looked to, because there is no allegation of the bill which authorized it to be made.

The bill, after reciting that Alexander had borrowed of Irwin, on the 4th February, 1841, the sum of $24,500, to be paid, &c. proceeds to state, "and that to secure the payment of the said debt, the said William J. Alexander, on the 4th February, 1841, executed a deed of trust," &c. In our opinion it does sufficiently appear, that the beneficiary was cognizant of, and assenting to, the deed—certainty to a common intent, is all that is required in Chancery pleading. It is not, to be sure, stated so certainly as to exclude every other conclusion, but such extreme accuracy is not required, and certainly is rarely found, in Chancery pleading. The pleader here, is giving a historical narrative of the transaction. He commences by stating the loan of the money, and the terms of the loan, and in the next sentence says, *and* to secure the payment of the said debt, on the 4th of February, 1841, which is the day the loan is stated to have been made, executed, &c. Certainly, it cannot be doubted that the pleader is speaking of an entire transaction; there is as much reason for supposing that Irwin was present when the deed was made, as that he was there when the contract of loan was entered into. We think that by all rules of just interpretation, or fair criticism, we must understand this to be an allegation, that the deed was made to secure the payment of the debt, with the knowledge and consent of the beneficiary.

We come now to the more important question, whether the facts attending the transaction, *dehors* the deed, when considered in connection with it, will authorize, or require this Court, to pronounce it fraudulent, and void, as against creditors.

To justify a Court, in inferring that a deed was made with fraudulent intentions, when no fraud in fact is proved, two things at least must concur—there must be creditors known to the parties, who may by the provisions of the deed be delayed, or hindered, in the collection of their debts, and the necessary consequence of the deed must be to produce such delay, or hinderance. In the cases of assignments which have heretofore come before this Court, and some of which are so strongly relied on by the counsel for the plaintiff in error, the deeds were evidently made either by insolvents, or in evident contemplation of insolvency, and necessarily suppose, if they do not admit, an inability on the part of the debtor to pay all his debts.

Such were the cases of Ashurst v. Martin, 9 Porter, 566; Gazzam v. Poyntz, 4 Ala. Rep. 374; and Cummings & Cooper v. McCullough, 5 Id. 324. In Wiswall v. Ticknor & Day. 6 Ala. Rep. 178, the decision turned upon the inference of fraud, arising from the fact that the property was left with the mortgagor, after the law day had passed.

In these cases the avowed object of the deed, was to place the property conveyed by it, beyond the legal pursuit of creditors, and by the deed itself, to provide another mode for the payment of their debts. In such a case any control retained over the property by the debtor, or benefit secured to him, being inconsistent with the honest purposes of the deed, is a fraud upon the creditors. But, when a deed is made by one not insolvent, to secure a single creditor; when it does not convey all the property of the debtor, and not more than is reasonably sufficient to secure the debt, no such presumption arises, although there may be other creditors, and the debtor may stipulate for a benefit under the deed, and be entitled to the use of the property. This indeed is the common case of a mortgage. Such in effect was this case. An advance of a large sum of money (near $20,000) was made by Irwin, to Alexander, to enable the latter to extricate himself from embarrassment, and which is applied to the payment of his debts. To secure the repayment of the debt in five years, this deed is made. The avails of the property so conveyed being devoted to the same object, and the property does not appear to have been more than sufficient for the purpose of securing the debt. It appears that the debtor had property to the value of twelve or fifteen thousand dollars, not embraced in the deed. It also appears, that he was considered good for all his debts, at the time the deed was made. He has been examined as a witness and says that he informed Irwin, that if he could procure the loan, to relieve him from pressing debts, his "affairs would be safe and easy." That his subsequent embarrassment has arisen from the failure of a mercantile firm, of which he was a member, and which he then supposed would yield him a profit.

We think it perfectly clear, that these facts do not establish a fraudulent intent, or authorize the inference of any such intention, because it does not appear, that any creditor would

necessarily be delayed by the execution of the deed; and if the deed was justifiable at the time it was made, it cannot become fraudulent by a change in the condition of the grantor subsequent to that time.

It has been shown, that in such a case as the present, the grantor might have reserved an interest in the deed, but if it were necessary to consider that question, we should be inclined to think no interest whatever was retained. He stipulates for the possession and management of the property, but the entire avails of the plantation were to be applied to the payment of the debts, and as he did not reside in Alabama, and only visited his plantation once a year, the whole effect of the stipulation appears to have been, to authorize him to employ the overseers, and to sell the products of the plantation to perform the trust.

The stress of the argument has been, that by the provisions of the deed the plantation and slaves were placed beyond the reach of the other creditors for five years, and if so, might be thus protected for an indefinite period of time, and that the effect would be, to place the property out of the reach of the law, until the debt was paid from the profits.

Doubtless a deed made in contemplation of the insolvency of the grantor, with such a provision, as it must necessarily delay and hinder the creditors not provided for in the deed, in the collection of their debts, might be evidence of a fraudulent intent. If, however, a deed fairly made to secure a debt, becomes, by subsequent events, oppressive, or injurious to other creditors, although such a condition of things would not affect the deed, which was valid at its inception, yet a Court of Chancery would compel the beneficiary so to act, as not to injure other creditors. A familiar example of this rule, is, where one creditor has two funds to which he may resort, whilst another has but one, the Court will compel him to seek satisfaction out of that fund to which the other creditor cannot resort, so that both debts may be paid. So we entertain no doubt, that in such a case as the present, a Court of Chancery may direct the trust to be executed immediately, and by a sale of the property after satisfying the trust, pay over the residue to the other creditors.

These views conduct us to the conclusion, that this deed is

valid, and should be upheld. We are not insensible to the earnest argument of the counsel for the plaintiff in error, against the danger to the community from a decision, which would facilitate the commission of fraud; but it is a duty quite as imperative on the Court, to sustain contracts which are *bona fide*, as it is to suppress those which are fraudulent.

It is to be observed, that in this case, the attachment and execution of the plaintiffs in error, were levied on the land and slaves conveyed by the deed. Whether their executions might not have been levied on the products of the plantation, would involve an inquiry not raised upon this record, and upon which, for that reason, we decline the expression of any opinion.

The objection taken to the registration of the deed, does not appear to be well founded.

Let the decree of the Chancellor be affirmed.

SMITH v. ARMISTEAD'S EX'RS.

1. In order to let in evidence to show that a promissory note, the foundation of the action, has been paid, or that its consideration has failed, it is not necessary to identify the note by the positive declaration of a witness: its identity may be determined by the jury, from the description given of it, and other circumstances.
2. Where testimony is offered, which is admissible in itself, though insufficient to warrant the jury in finding a verdict, the Court cannot assume that the party has no further proof to advance, and reject the evidence.
3. The register in which a deed is recorded pursuant to statute, is but a copy, and cannot be read as evidence of its contents, without first accounting for the absence of the original.
4. Although the matter to which a writing relates may be proved entirely independent of it, yet if its contents are inquired after, it must be produced, or its absence excused.

5. *Quere*—Is it competent to give parol evidence of the contents of papers, where they do not form the foundation of the cause, but merely relate to some collateral fact?

6. Secondary evidence of the contents of a deed is not admissible, merely because the person offering it is not a party to the deed: if the paper is in the hands of a third person under such circumstances, that the law will not compel him to produce it, then secondary evidence is admissible; but if he who has the custody of it, is within the reach of the Court, *ordinarily*, a *subpœna duces tecum*, would be proper to coerce its production.

Writ of error to the County Court of Clarke.

This was an action of debt on a specialty, dated the 27th of February, 1830, by which the plaintiff in error promised to pay to the defendant's testator, the sum of eighty dollars, on the first of January thereafter for the hire of Rachel and her child Emma, and her daughter Ann. The cause was tried on the pleas of payment, failure of consideration, &c.; the jury returned a verdict for the plaintiff for the amount of the note and interest, and judgment was rendered accordingly.

On the trial the defendant excepted to the ruling of the Court. It appears, from the bill of exceptions, that the defendant offered to prove by a son of the testator, that the testator, in the fall of 1838, or '9, told witness, that he held a note against the defendant, his son-in-law, for the hire of certain negroes named Rachel, and Emma and Ann, her children; that he had since, by deed of trust, settled them on his daughter, the defendant's wife. Defendant then proposed to show by the same witness, that the negroes named in the specialty declared on, were the same as those mentioned by the testator in the conversation deposed to. The testator told the witness the same in substance, both previous and subsequent to the fall of 1839. To this evidence, the plaintiff's counsel objected, on the ground, that the witness could not state positively, that the note sued on was that to which the testator referred; and his objection was sustained.

The defendant then produced, from the office of the clerk of the County Court, a book of records, wherein was duly recorded a deed of trust, by which the negroes designated in the note declared on, were conveyed to the trustees by the testator for the benefit of his daughter, the defendant's wife. To the introduction of this evidence the plaintiff objected, on the

ground, that the original deed must be produced, or its absence accounted for; this objection was also sustained.

A. Graham, (of Greene,) for the plaintiff in error, insisted, that the Court erred in excluding both the parol and documentary evidence; and it cannot be assumed, that the defendant was not prejudiced by rejecting the witness; for the Court cannot know what evidence he had in reserve, and was prevented from offering, in consequence of the exclusion of his testimony. In respect to the copy of the deed, in a suit between persons not parties to it, and who are not entitled to its custody, it is believed to be admissible evidence.

Blount, for the defendant, contended, that although the witness for the defendant below may have been rejected for a very insufficient cause, yet as the defence could not have been thereby prejudiced, it was not a sufficient reason for reversing the judgment. [Caruthers & Kinkle v. Mardis' admr's. 3 Ala. Rep. 599.] The general rule which requires the production of the original deed, unless its absence is accounted for, he conceived, was applicable to this case. [2 Ala. Rep. 144.]

COLLIER, C. J.—The reason for which the rejection of the testimony of the defendant's witness was asked, is clearly insufficient. It was not necessary to show, by positive proof, that the note declared on, was the one to which the testator referred, in the conversation which it was attempted to prove. The jury should judge of its identity from the facts stated, and might determine the point as satisfactorily from the description given of it, (if precise and accurate,) as from the positive declaration of a witness; especially if other testimony was adduced showing that the testator had no other note founded on the same consideration.

In considering the admissibility of evidence, the inquiry to be made, is, whether it is pertinent, and does it tend to establish a fact material, to the case or defence; the question of its sufficiency addresses itself to the jury under the instruction of the Court. It may be conceded, in the present case, that the testimony which the witness was allowed to give, disconnected from every thing else, or unaided by further proof, was entirely unimportant; but it cannot be assumed, that the de-

fendant had nothing further to offer. He may, perhaps, if allowed to proceed, have shown that the testator said, he did not intend to require payment of the note, and had relinquished the hire reserved by it, or some other fact connected with the gift, showing that the defendant was not liable to its payment. The testimony cannot be said to be so palpably irrelevant, as to be incapable of assistance by the proof of other facts.

In Innerrarity v. Byrne, 8 Porter's Rep. 176, it was said, "if testimony is offered, which in itself is inoperative and void, and is not proposed to be connected with any thing else which may give it validity, the Court, if desired, cannot refuse to reject it." And in Mardis' admr's. v. Shackleford, 4 Ala. Rep. 501, we held, that "if evidence be irrelevant at the time it is offered, it is not error to reject it, because other evidence may afterwards be given, in connection with which, it would become competent. If it would be relevant in conjunction with other facts, it should be proposed in connection with those facts, and an offer to follow the evidence proposed, with proof of those facts at a proper time." Now we will not say, that the Court may not have rejected the testimony of the witness, because its pertinency was not shown. If such had been the decision, the defendant might, perhaps, have made a disclosure of facts which he expected to prove, that would have removed the objection. This he was prevented from doing, by the Court's ruling, that the evidence adduced was inadmissible to show, that the note of which the testator spoke, was the one on which the action was founded. As then, the rejection of the witness for the reason which induced it, was erroneous, and may have been prejudicial to the defendant, it was an error of which he may take advantage.

The second question raised upon the bill of exceptions is this, is the book in which the clerk of a County Court records a deed, evidence of its contents, without first accounting for the absence of the original. In Fryer v. Dennis, 2 Ala. Rep. 144, this precise question arose. We there said, that "our statutes in regard to the registration of deeds of land, make a certification of their acknowledgment, or probate, written upon, or under the same, evidence of their genuineness;" and further provides, that "if the original deed, or conveyance be lost, or mislaid, or be destroyed by time or accident, and not in the

party's power to produce, the record of such deed, or conveyance, and the transcript of such record, certified to be a true transcript by the clerk in whose office the record is kept, shall be received in evidence." This statute, supposing it to be applicable to personal estate, we held, did not authorize the copy of a deed, unless a sufficient reason was shown for the non-production of the original; and independent of the statute, we considered it inadmissible, because it did not appear that the higher evidence was not in reach of the party, or the process of the Court. [See also, 3 Phil. Ev. C. & H.'s notes, 1208–9; O'Brien v. Kennedy, at the last term.]

Although the transaction, or matter to which a writing relates, may be proved entirely independent of it, yet if its *contents* are inquired after, it must be proved, or its absence excused; for as to these, it is the best evidence. True, there are some cases which countenance the idea, that parol evidence of the contents of papers may be given where they do not form the foundation of the cause, but merely relate to some collateral fact. [McFadden v. Kingsbury, 11 Wend. Rep. 667; Mumford v. Browne, Anth. N. P. 40; Southwick v. Stevens, 10 Johns. Rep. 443; Lowry v. Pinson, 2 Bailey Rep. 324; Tucker v. Welch, 17 Mass. Rep. 160.] Two of these cases, and perhaps a *dictum* in another, thus lay down the law, but these, it is shown by the learned annotators upon Phillips, go beyond what is allowable. [See note, 860, 3 Phil. Ev. 1207.]

It is supposed by the defendant's counsel, that inasmuch as the defendant is not a party to the deed, it was competent for him to prove its contents by secondary evidence. There is no exception to the rule which thus relaxes it. If the paper is in the hands of a third person, under such circumstances, that the law will not compel him to produce it, then secondary evidence is admissible; but if he who has the custody of it, is within reach of the Court, *ordinarily*, a *subpœna duces tecum* would be proper to coerce its production.

Without adding more upon this point, it is clear, that the defendant laid no foundation for the admission of secondary evidence, and if he proposed to prove the contents of the deed, the record was properly excluded. But for the error in the first point considered, the judgment is reversed and the cause remanded.

MASON, ET AL. v. WATTS.

1. When an execution against two is placed in a sheriff's hands for collection he cannot discharge himself from a rule, suggesting that he could by due diligence have made the money, by showing that the plaintiff had previously released one of them.
2. The sheriff can excuse himself from such a rule by showing that the defendants had no property out of which the money could be made; and this after levy, if he has returned the property to the true owner.
3. The omission to return a claim bond and affidavit does not *per se*, make the sheriff liable for the value of the property levied on. Even when he takes a defective bond he may discharge himself, by showing, that the defendants were not the owners of the property levied on, and that it has been returned to the true owner.

Writ of error to the Circuit Court of Wilcox.

MOTION, under the statute, by Watts, against Mason and others, as the securties of Jonathan M. Hill, sheriff of Wilcox county, for judgment against them, upon a suggestion that the said Hill, by the use of due diligence, could have made the money upon a certain execution placed in his hands for collection, issued at the suit of Wills, against the goods and chattels, &c. of William S. and Joseph W. Patton.

Upon the trial of an issue taken upon this suggestion, the plaintiff read to the jury the execution described in the rule, which had upon it the following entries, and none other, to wit: Rec'd, Dec'r 12, 1839. J. M. HILL, sheriff. Levied on a negro boy named Isaac, as the property of W. S. Patton, to satisfy this and other executions in my hands against said defendant. Property pointed out by W. S. Patton, Dec. 12, 1839. J. M. HILL, sheriff, by W. D. Burt, deputy. It was proved, however, that Joseph W. Patton pointed out the property. It was also shown that the slave had been levied on as the property of W. S. Patton. It was also shown that the slave was claimed by one Benjamin B. Patton, who made an affidavit and executed a blank piece of paper, to be filled out as a claim bond;

on this, the slave was delivered to him. No affidavit or claim bond, was returned by the sheriff to the Court, nor was it known what had become of the papers at the assertion of the claim. The defendants proved, that before the levy of the execution on this slave, the plaintiff had discharged Joseph W. Patton from the execution, in consideration that he would do every thing in his power to make the money out of the other defendant; this was proved to have been done, and that the discharge was absolute.

It was also shown, that neither the plaintiff, or his attorney, or any agent for him, resided in Wilcox county. There was also proof, conducing to show, that the slave, for two years preceding the levy, and ever since, did not belong to either of the defendants, but that it did belong to Benj. B. Patton.

On this state of proof the Court instructed the jury—

1. That the discharge of Joseph W. Patton, by the plaintiff, did not impair his right to prosecute this rule.

2. That the sheriff and defendants could not discharge themselves by showing, that the slave levied on did not belong to the defendants in execution.

3. That the sheriff having made the levy, he was bound to notify the plaintiff, his attorney, or agent, that he required indemnity before he could discharge the levy.

4. That unless a claim had been put in, under the statute, and the papers returned by the sheriff to the Court; or unless he had demanded indemnity, and failed to get it within ten days, he and his sureties were liable in this case, for the value of the slave levied on.

It was shown, during the trial, that at the time the said claim was asserted by Benjamin B. Patton, he told the principal sheriff that the slave belonged to him, and to this the sheriff replied, that he knew the slave was his property.

The defendant excepted to these charges, and they are now assigned as error.

Bethea and Sellers, for the plaintiff in error, cited 3 Cowen, 376; 20 John. 153; 1 Chitty's Plead. 546; 1 Am. Dig. 119; Smith v. Locke, 4 Ala. Rep. 290, as to the first charge; and 5 S. & P. 441, as to the fourth charge.

No counsel appeared for the defendant.

GOLDTHWAITE, J.—1. On the first instruction, given in this cause to the jury, our opinion is the same as was that of the Circuit Court. It is not material to the sheriff or his sureties to inquire, whether both, or but one of the defendants in execution yet remained the debtor of the plaintiff. This is not a suit where the attempt is made to recover from the sheriff a debt for which the defendants in execution have been discharged; therefore we lay that entirely out of view. So far as the sheriff is concerned, the agreement between the plaintiff and one of the defendants in execution, and his discharge, that is entirely personal.

2. The other charges involve but one general principle, which is, whether a sheriff is liable upon this suggestion, when he is prepared to show that the defendants in execution had no property out of which the money could rightfully be made. This question was, to some extent, considered in Leavitt v. Smith, decided at the last term. Our opinion then intimated, was, that the sheriff could excuse himself, by showing that the defendant in execution had no property in the goods levied upon. The reason for this is, that the sheriff, by making a levy on the goods of a third person, becomes a trespasser, and being so, the law does not impose on him the duty of holding the goods, after he has ascertained their true ownership. The statutes in relation to indemnity bonds, were enacted to relieve sheriffs from their common law liabilities, to the extent which the acts provide for. It is possible, too, that their effect may be, to cast on the sheriff, who refuses to levy after a bond is tendered, the *onus* of showing that the debtor was not the owner. Otherwise they do not seem to either impose additional duties, or affect his common law liabilities.

3. When a claim is interposed under the statute, as it may be when the goods of a stranger are levied on, the sheriff has nothing further to do with the property claimed; nor has the claimant any redress against him for the supposed trespass, in making a levy. The plaintiff in execution immediately, and by force of those proceedings, becomes an actor against the claimant, and may take the necessary steps, by rule or otherwise, to compel the sheriff to return the necessary papers.

4. Nor is it unlikely, if a loss results, either by being cast in costs or otherwise, from the neglect to retain the affidavit of

claim, and the bond executed by the claimant, that the sheriff will be liable in an action on the case; but the taking a defective bond, as was the case here, does not, either by itself, or coupled with the omission to return it, make the sheriff liable, *per se*, for the value of the property levied on. *Prima facie*, he would be charged on account of his levy; but he could discharge himself, as in any other case of tortious levy, by showing that the defendant in execution had no property in the goods, and that the party from whom they were taken had been reinvested with the possession. Bristol v. Wilsmore, 1 B. & C. 514, is conclusive to show that the owner of goods may retake them from the sheriff, even after a levy at the suit of another. This being the law, it would act most oppressively if such an officer could not defend himself, by proof of the same facts which would defeat his action against the true owner, subsequently taking them from the sheriff; and which would render the sheriff liable, if sued in the first instance.

The judgment must be reversed, and the cause remanded.

LOOMIS, ADM'R. v. ALLEN.

1. The statute which authorizes an attachment in favor of a resident citizen, against the executor, or administrator, of his deceased non-resident debtor, can only be levied on the property of the deceased within this State, which has not come to the possession of his personal representative, so as to be assets in his hands.
2. When such an attachment is improperly sued out, it must be abated by plea, and cannot be taken advantage of after a judgment by default.
3. The proper judgment in such a case is the condemnation of the property levied on, for the satisfaction of the debt; and if replevied by the administrator, then against him personally, to be discharged by the delivery of the property.
4. Where the judgment is *de bonis propriis*, in such a case, and not in the alternative, it will be amended in this Court, at the costs of the plaintiff in error.

Error to the Circuit Court of Sumter.

ATTACHMENT commenced by the defendant, against the plaintiff in error.

The defendant in error made affidavit before a justice of the peace, that Edgar Loomis, administrator of Eli O. Loomis, deceased, who, at the time of his death, resided in the State of Mississippi, was justly indebted to him in the sum of $167 80, that Edgar Loomis resides out of the State of Alabama, and that there is property, which was of the said Eli O. Loomis, at the time of his death, in the State of Alabama. Bond being executed, an attachment was issued, returnable to the Circuit Court of Sumter, which the sheriff returned, executed on a slave, and that a replevy bond had been executed, which was returned.

A declaration was filed, and judgment final, by default, rendered against the defendant, in his individual capacity, and not as administrator. From this judgment this writ is prosecuted, and the following errors assigned:

1. The affidavit is insufficient to authorize the attachment, or support the judgment.

2. The sheriff's return is insufficient to give the Court jurisdiction.

3. The Court had no jurisdiction over the person or property of the plaintiff in error.

4. The Court erred in rendering judgment, *de bonis propriis.*

5. The Court erred in rendering judgment without proof of the death of E. O. Loomis, that he was a non-resident when he died, and that the property attached was in this State.

6. In rendering judgment, when it no where appears in the record that the plaintiff was a citizen of the State.

REAVIS, for the plaintiff in error. This proceeding is under the statute, (Clay's Dig. 58, § 14,) and can only be taken by citizens of the State.

If this is, as contended, a proceeding *in rem*, the Court could not render a judgment without proving the facts, which authorized the suing out of the attachment. [5 Ala. Rep. 239.] The return of the sheriff ought to show the facts, giving the jurisdiction, or it should appear by proof *aliunde*, by analogy to similar proceedings in admiralty. [9 Porter, 111.]

In this case it does not appear that any one had authority to

replevy, and the sheriff having lost the possession, the Court had no jurisdiction.

The judgment cannot be amended in such a case as the present.

Bliss & Baldwin, contra. It does appear from the bond, that Evan Allen is a citizen of Alabama, but if it did not, the defect could only be reached by plea in abatement. The fact, if it be so, that the slave levied on was not in the State, at the time of the death of the debtor, is unimportant. A suit commenced by attachment, does not differ from a suit by capias, except in the mode of commencing it. [2 Ala. Rep. 328.] The execution of the replevy bond, is evidence of notice, and gives the Court jurisdiction, and the judgment by default, is an admission of the facts stated in the declaration.

ORMOND, J.—The attachment in this case is issued upon the following clause of the attachment law: "And in case of the death of any debtor residing out of the limits of the State, having lands or other property therein, the creditor resident within the State, shall in like manner be entitled to recover by attachment, against the executors, and administrators; and execution shall issue accordingly, against the property so left within the State." [Clay's Dig. 58, § 14.] The design of this statute appears to have been, to give the resident creditor a remedy against the property of his deceased non-resident debtor, without taking out letters of administration. To accomplish this, it permits the attachment to issue against the non-resident executor or administrator of the deceased non-resident debtor, to be levied on the property of the debtor left within this State.

We entertain no doubt, that the attachment must be levied on property which the debtor left within this State, and which has not been reduced into possession by the foreign executor, or administrator, so as to be assets in his hands. It is equally clear, that the attachment can only be sued out by the resident citizen. As neither of these facts appear on the face of the proceedings, it becomes necessary to inquire, how they may be taken advantage of.

The 31st section of the attachment law, (Clay's Dig. 61,) expressly declares, that it shall not be necessary to state in the affidavit made for the purpose of suing out an attachment, that the plaintiff is a resident, and that if any one not authorized should sue out an attachment, it may be abated on plea. So, in a previous part of the act, it is provided, "that every attachment issued without bond, and affidavit, taken and returned as aforesaid, shall be abated, on the plea of the defendant."

Accordingly it was held in Jackson v. Stanley, 2 Ala. Rep. 326, that when the fact of the non-residence of the plaintiff did not appear in the affidavit, advantage could only be taken of it by plea in abatement. To the same effect is Calhoun v. Cozzens, 3 Ala. Rep. 21; and it is considered in the case first cited, that the effect of our statutes regulating this proceeding, is, that where the jurisdiction is not questioned by a plea in abatement, suits commenced in this mode, are upon the same footing with suits commenced by writ.

It is urged, that the attachment authorized by this section of the act, is peculiar, acting as it does upon the property levied on, and that the other portions of the act requiring the jurisdiction to be questioned by a plea in abatement, do not apply. We can perceive no reason for making such a distinction, and certainly the statute makes none. The 31st section before referred to, is general in its terms, it is subsequent in point of time, to the act under which this attachment was sued out, and was doubtless intended to embrace it.

Considering this, then, as a suit commenced in the ordinary mode, the default admitted the indebtedness charged in the declaration, and authorized the rendition of a judgment. What that judgment should have been, we now proceed to inquire.

It is very clear, that under this section of the attachment law, the proper fund for the discharge of the judgment, is the property levied on; the judgment of the Court should therefore be a condemnation of the slave levied on by the sheriff, to the satisfaction of the debt. But as the slave in this case has been replevied by the administrator, a judgment should have been rendered against him personally, to be discharged by the delivery of the slave levied on, to the sheriff.

The judgment rendered in this case was *de bonis propriis*, but we can perceive no difference between this case and that

of a resident administrator, as to the power of this Court to amend the judgment, which we have always considered a mere clerical *misprision*. The judgment will therefore be here amended, at the cost of the plaintiff in error.

WEISSINGER & CROOK, EX PARTE.

1. The certificate of the clerk of an inferior Court, that a writ of error was sued out, &c., that the judgment was superseded by the execution of a bond, stating the names of the sureties, &c., if in other respects regular will authorize a judgment of affirmance, not only against the plaintiff in error, but his sureties also: this has been the practice for many years, and whether correct in its inception or not, must be adhered to, otherwise judgments long since rendered might be vacated.
2. The condition of a writ of error bond recited, that "the above bound S. C., hath applied for and obtained a writ of error in a certain suit heretofore pending and determined in the County Court of Perry, in which the said S. C. is plaintiff in error, and the said W. J. is defendant in error, in a plea of trespass on the case, returnable to the next term of the Supreme Court at T. on the first Monday of June, 1844. Now, if the said S. C. shall prosecute his writ of error to effect, and pay and satisfy the judgment which shall be rendered in the said cause by the Supreme Court, then this obligation to be void; otherwise to be, and remain in full force and effect." The statute requires that the bond shall be "conditioned for prosecuting the writ of error to effect, and to pay and satisfy the judgment which shall be rendered in the said cause by the Supreme Court:" *Held*, that the condition of the bond sufficiently conformed to the act, and that the generality of the recital which preceded it, did not affect the bond as a statute obligation.

Ex parte, Leonard A. Weissinger and James Crook.

Weissinger and Crook represent, by the affidavit of the former, that a judgment was rendered against them at the last term of this Court, as the sureties of Samuel Child, in a bond for the prosecution of a writ of error, sued out to revise a

judgment recovered in the County Court of Perry, against the latter, by William Johnson: that the judgment of this Court was rendered on motion, in the absence of the bond, upon the presentation of the certificate. The bond, it is insisted, is defective, and a motion is now submitted to vacate the judgment, of which the plaintiff has been duly notified.

H. Davis and E. W. Peck, for the motion, made the following points: 1. Upon the mere production of the certificate, this Court could not render judgment against the sureties of Child. 2. The condition of the bond does not conform to the statute, and no judgment could be rendered on it; certainly not as a statute bond. They cited the following authorities: Clay's Dig. 307, § 6; 308, § 13, 310, § 26; 2 Ala. Rep. 644; 3 Id. 484; 4 Id. 720; 5 Id. 657–562; 3 Stew. Rep. 109. See also, 4 Ala. Rep. 9; 5 Ala. Rep. 618.

Hopkins and A. Graham, (of Perry,) contra, made the following citations: Clay's Digest, 307, § 6–8; Hurlston on Bonds, 12, 31, 58; 3 Stewart's Rep. 109; 6 T. Rep. 702; 2 Cranch's Rep. 9; 2 Metc. Rep. 587–90; 1 Ohio Rep. 78; 3 Scammon's Rep. 349; 18 Pick. Rep. 257; 2 Wend. Rep. 292; 3 Id. 426; Clay's Dig. 309, § 19, 20.

COLLIER, C. J.—It is provided by the act of 1820, in connection with the statute of 1814, that in order to suspend a judgment in a case in which a writ of error has been issued, the party applying for the writ shall execute a bond, with sufficient security to the adverse party, to be approved by the clerk; conditioned for prosecuting the writ of error to effect, and to pay and satisfy the judgment which shall be rendered in the cause by the Supreme Court. Further, the clerk shall send an attested copy of the bond to the Supreme Court, with the transcript of the record; and in case of dismission or discontinuance of the cause, the act of 1815 authorizes the Supreme Court to render judgment against the principal and security in the bond. [Clay's Dig. 307. § 6.] By the act of 1820, it is declared, that thereafter no judgment shall be rendered by the Supreme Court, against the sureties of the bond of the plaintiff in error, but to subject them to the satisfaction of the judgment of affirmance, the clerk of the Court from which the cause was

removed, shall, upon the receipt of the certificate of the fact, issue a *scire facias* to the sureties, to appear and show cause why judgment should not be rendered against them. By the same act it is provided, that whenever a judgment which has been suspended by a bond shall be affirmed, ten per cent. damages shall be allowed. Further, the transcript of the record, together with the citation which was issued to the defendant in error, shall be delivered to the party suing out the writ to be returned to the first day of the next term of the Supreme Court; and in case it is not delivered to the clerk of that Court on or before the third day of the term, it shall be lawful for the Supreme Court, at that, or any succeeding term, on motion of the defendant, and on producing a copy of the citation served upon himself, certified by the sheriff, "or on producing a certificate from the clerk of the Court from which the writ of error issued, showing the time at which it issued, and amount for which judgment, and at what term of the Court below, to affirm the judgment of the Circuit Court with costs of suit." [Toulmin's Dig. 481–2–3.]

The statute of 1826 directs, that whenever the judgment, sentence, or decree of any inferior Court shall be affirmed in the Supreme Court, the latter shall render judgment against the surety, "in the bond executed on obtaining the appeal or writ of error, in the same manner, and for the same sum for which judgment shall be rendered against the plaintiff, or plaintiffs, complainants," &c. And it is made the duty of the clerk of the Supreme Court, to certify the judgment to the Court from which the cause came, against both the principal and surety; and the clerk of the latter Court shall issue execution against them for the amount of the judgment thus certified. [Clay's Dig. 310, § 26.]

The act of 1815, although it authorized the appellate Court to render judgment against both the principal and surety, in a writ of error of bond, yet it does not prescribe how the fact of suretyship shall be shown to that Court, when the transcript is not filed. It has been repeatedly held, that the statute of 1820 does not accord to the defendant in error the right of filing the transcript, but entitles him to an affirmance, if the cause is not brought up by the plaintiff, upon producing the citation, or certificate. At the time this latter act was passed,

the Supreme Court was inhibited from rendering a judgment against the sureties. This power was restored by the act of 1826, but the form of the certificate was not directed to be modified so as to show that a bond had been executed, and who were the sureties therein. In the absence of legislation upon this point, the clerks of the inferior Courts so framed their certificates, as to impart the necessary information, and enable the Supreme Court to render such a judgment as the act of 1826 required, where the judgment had been suspended by the execution of a bond with sureties. Such certificates have been received as satisfactory, without the production of the bond, or a copy; they have been acted on, and the practice tacitly acquiesced in as regular since 1826. Whether the construction which gave rise to this practice was too liberal, it is too late now to inquire; the more especially as the bench and the bar have never until now objected to it, and the legislature have not thought it necessary to make any countervailing enactments. To treat the question as *res integra* would cause many judgments to be vacated, and perhaps unsettle individual rights, to an alarming extent. In this view of the case we think the sureties of Child cannot be heard to object, that the bond for the prosecution of the writ was not in this Court when the judgment was affirmed.

It is further objected, that the bond which was executed by Weissinger and Crook, as sureties, does not conform to the statute, and that the judgment rendered thereon cannot be sustained. The condition recites, that the above bound Samuel Child hath applied for, and obtained a writ of error in a certain suit heretofore pending and determined in the County Court of Perry, in which the said Samuel Child is plaintiff in error, and the said William Johson is defendant in error, in a plea of trespass on the case, returnable to the next, term of the Supreme Court at Tuscaloosa, on the first Monday of June, 1844. Now, if the said Samuel Child shall prosecute his writ of error to effect, and pay, and satisfy the judgment, which shall be rendered in the said cause by the Supreme Court, then this obligation to be void; otherwise to be and remain in full force and virtue." The statute only requires that the bond shall be "conditioned for prosecuting the writ of error to effect, and to pay and satisfy the judgment

which shall be rendered in the said cause by the Supreme Court.

The condition of the bond in question, it will be observed, corresponds almost literally with that prescribed by the act, and there can, therefore, be no question as to its legal sufficiency; the inquiry is, whether the recital that precedes, is so general as to affect the validity of the bond. It is explicitly stated who were parties to the suit in the County Court, what the character of the action, that it has been determined, who applied for the writ of error, and when it was returnable; but it is objected, that it is not shown against whom the judgment was rendered, for what amount, and when. The recital we think fairly warrants the inference, that Child was the unsuccessful party in the Court below. This is indicated by the execution of a bond to suspend the judgment. As it respects the other objections, we think them untenable. If the bond was as special as it is insisted it should be, still it might so happen, that two judgments for a similar amount were rendered between the same parties on the same day. In such case, it could not be maintained, that a judgment could not be rendered upon it as a statute bond. There, its application to the particular case could be shown, and here, the maxim of *id certum est quod certum reddi potest*, might be invoked to support the bond. The record below, or the certificate here produced would supply the defects, if they can be considered such.

In respect to a bond for the prosecution of a writ of error, the Supreme Court of Ohio say, "there is no case where a bond fairly and regularly executed, and comprising, substantially, all the requisites of the statute, has been adjudged void, because it departed in some one or more particulars, from the exact words used in the statute authorizing it to be taken. It has been the uniform object of our Courts, to support bonds executed under the provisions of law, when, by a reasonable interpretation, such bonds can be made to meet the intention for which they were required and taken. Where the party has had all the advantages of making the bond, the Court cannot aid him to avoid its obligation, by adopting strained and rigid maxims of construction." [Gardener v. Woodyear, 1 Ohio Rep. 78.]

In The People v. Monroe Com. Pleas. 3 Wend. Rep. 426, it was held, that the misrecital of the day on which a judgment was rendered before a justice of the peace, in an appeal bond, is a fatal variance, but if no day had been mentioned, the bond would have been good.

The bond in the present case, is sufficient in substance, and the motion is consequently denied.

ORMOND, J., dissented from the last point determined by the Court.

EDWARDS v. WICKLIFFE.

1. When there is no levy of an attachment, but a garnishee is summoned, who vouches one to whom the debtor has assigned the demand before service, and such proceedings are had, that all connected with the garnishment are discharged, a judgment rendered by default against the debtor is irregular, and will be reversed on error.

Writ of error to the County Court of St. Clair.

WICKLIFFE sued out an attachment against the effects of Edwards, returnable to the County Court of St. Clair. The sheriff returned, that the defendant had neither goods or chattels, lands or tenements, to be found in his county, to make a levy, but summoned Edward Edwards, as a garnishee. At the return term of the attachment, the garnishee appeared and answered to this effect: That he had, at the service, &c. in his hands, belonging to the estate of Thomas Edwards, deceased, the sum of one hundred and twenty-three dollars, after paying all reasonable expenses, and that the said Thomas Edwards, the defendant in this case, is the legal heir of the said Thomas Edwards, deceased, and that the said sum is the distributive

share of each heir; and which sum he, the said garnishee, was ready at any time to pay out to the proper person, when legally authorized so to do by law.

At the next ensuing term of the Court, a judgment by default was rendered in the suit against the defendant, but the damages being uncertain, an inquiry was directed to be had at the next term. At the same term, on the motion of the garnishee, it was ordered, that he be allowed to make a further answer to the garnishment. At the June term, 1844, the plaintiff had his damages assessed by a jury, and a final judgment was then rendered. At this term the garnishee answered further, that the sum of money acknowledged to be held for Thomas Edwards, had been transferred to John F. Edwards, previous to the service. A notice was then issued, under the statute, to said John F. Edwards, to contest his right to the money with the plaintiff, and such proceedings were had upon an issue, that a jury determined the right to be in said John F. Edwards.

It is now assigned for error, that there was no service of the attachment, sufficient to bring the defendant before the Court. Also, that judgment should not have been rendered against the defendant in attachment, as the answer of the garnishee disclosed no indebtedness.

B. Pope, for the plaintiff in error.

S. F. Rice, contra.

GOLDTHWAITE, J.—Under our attachment law, the summons of a person indebted to the defendant, is equivalent to a levy upon his effects, and produces the same consequences. [Duncan v. Ware, 5 S. & P. 119; Thompson v. Allen, 4 Ib. 184.] If the person summoned as a debtor should prove not to be so, the attachment has failed of its object, and the defendant is not regularly before the Court, because there is nothing, which, by any reasonable intendment can be construed so as to affect him with notice of the pendency of the suit. The consequence of this rule is, that when there is no levy upon effects, and the garnishee, as well as the person who is vouched to appear, as claiming an interest in the debt attached, are both discharged, then nothing remains to support the attachment, and

any judgment rendered against the debtor upon the supposed indebtedness of the garnishee falls, as a matter of course.

Such is the condition of this case, and without investigating the question, whether the judgment could be sustained if the first answer stood alone, we are satisfied that the subsequent discharge of all the parties connected with the garnishee process, left the judgment without any foundation.

Judgment reversed.

HARE v. FULLER.

1. A bailee of hogs, running at large in the range, may maintain an action of trespass for an injury to the hogs, as by injuring them with dogs, and splitting their hoofs, though none be killed.

Error to the Circuit Court of Talladega.

This action was commenced before a justice, to recover damages for unlawful injury of stock, viz: hogs, by the plaintiff, against the defendant in error. Judgment being given for the plaintiff, the defendant appealed to the Circuit Court. In that Court, the case came on to be tried, the amount claimed being under twenty dollars. It was proved that the plaintiff was the agent of one Rinehart, and as such had the management and possession of his stock of hogs, they not being penned up: Rinehart had left the country, leaving the plaintiff to control and take care of them. Some of the hogs had broken into the premises of the defendant, which was badly fenced, and the defendant had injured them with dogs, and by splitting their hoofs, to the amount of ten dollars. None of them were killed. The defendant objected that the warrant was defective, in not showing that the damages did not exceed twenty dollars, and that the plaintiff had not such a title as would enable him to maintain the action.

The Court gave judgment for the defendant, from which this writ is prosecuted, and which is now assigned for error.

W. P. Chilton & Bowdon, for plaintiffs in error, cited Story on Bail. 73, 109, 110; 1 B. & A. 59; 2 Saunders, 47; 7 Term, 12; 2 Bulst. 306; 2 Taunton, 302; 1 Str. 505; 2 Bing. 173; 7 Cowen, 752; 1 Stew. 320; 8 Porter, 36; 5 Mass. 303; 1 Chitty, 71, 194-5; 1 B. & P. 47; 1 N. H. 289; 1 Ala. Rep. 157, 264; 2 Id. 494.

Rice, contra, cited 7 Por. 37; 1 Ala. Rep. 297; 7 Cow. 294; 8 Id. 137; 9 Ib. 687; 4 Johns. 84; 9 Id. 361; 9 Mass. 104, 265; 14 Id. 217.

ORMOND, J.—The only question upon the record, necessary to be noticed, is the right of the plaintiff to maintain the action. The argument upon this point is, that the plaintiff, as bailee, did not have such a possession as would enable him to maintain the action, and that if he did, a mere bailee cannot maintain an action for an injury to the property, although he may for an injury to the possession.

We think it indisputable, that the plaintiff had such a possession of the hogs, as would enable him to maintain an action for an injury done to the possession. He had, indeed, all the possession which the owner could have, of stock running at large in the range, and if he could not maintain the action for this reason, neither could the owner.

It is equally as clear, that he could maintain an action for an injury to the property, as well as for an actual taking, upon the ground that he is responsible to the owner, and that an injury to the property, is an injury to the possession. This is an ancient doctrine of the common law. "Every person who is answerable to another for a personal chattel in his possession, has such a special property in the chattel, as enables him to maintain an action of trespass, for the taking or *injuring* thereof, by a stranger." [6 Bac. Ab. Trespass, C. 565.] And a recovery, by either the bailee or the owner, would oust the other of his right of action. [Ib. 566.]

Authorities on the point, might be multiplied to an indefinite extent; it is only necessary to refer to those cited by the plaintiff's counsel. Let the judgment be reversed and the cause remanded.

GRAYHAM & CHRISTIAN v. ROBERDS.

1. The writ was returned executed on C. only, who pleaded, as to G. there was no return; the declaration was against both G. and C., and both their names were stated as defendants on the margin of the judgment entry, which recited that the parties came by their attorneys, and thereupon came a jury, &c., "*to try the issue joined*," who find for the plaintiff, the amount of debt declared for, with damages: Thereupon it is considered "that the plaintiff recover of the defendants the aforesaid debt," &c.: *Held*, that they only were parties who had united in the issue tried; that the judgment was a consequence of the verdict and intended to conform to it; and that the substitution of the word "*defendants*" for *defendant*, would be treated as a mere clerical misprision.

Writ of error to the Circuit Court of Jackson.

This was an action of debt at the suit of the defendant in error. The writ was returned executed on the defendant only, who pleads payment and set off; as to the defendant, Grayham, there was no return. The plaintiff declared against both the defendants, and the following entry appears in the record of the trial, verdict and judgment: "Letty Roberts v. John Grayham and William H. Christian. Came the parties by their attorneys, and thereupon came a jury of good and lawful men, to wit: Matthew Washington and eleven others, who, being impannelled, sworn and charged well and truly to try the issue joined, upon their oaths do say, we, the jury, find for the plaintiff, to the amount of one hundred and forty-one dollars and ninety-five cents, the debt in the plaintiff's declaration mentioned; also, the sum of twenty dollars and fifty cents damages, for the detention of the same. It is therefore considered by the Court, that the plaintiff recover of the defendants the aforesaid debt and damages, as by the jury aforesaid assessed, and also for her costs," &c.

C. C. Clay, Jr., for the plaintiffs in error, insisted that process was never served on Grayham, and that a judgment was rendered against him, although he did not appear in person or by attorney. [Williams v. Lewis, 2 Stew. Rep. 41; Gilbert, et al. v. Lane, 3 Porter's Rep. 267.]

No counsel appeared for the defendant in error.

COLLIER, C. J.—The legal effect of the omission of the sheriff to make a return of the process as to Grayham, has been heretofore held to be equivalent to an affirmation by the sheriff, that he could not be found. This being the case, it is clear that he was not subject to a judgment, and the only questions are, whether the record shows an appearance by him, and whether the judgment has been rendered against him. In Puckett v. Pope, 3 Ala. Rep. 552, it was held, that where there are two defendants, only one of whom was served with process, and pleads, and the judgment entry recites that the parties came by their attorneys, and thereupon came a jury, &c., it will be intended that they only came, who had made up an issue to be tried. [See also, Catlin, Peeples & Co. v. Gilder's Ex'rs. 3 Ala. Rep. 536. Where a writ is sued out against two joint makers of a promissory note, and served on one only, but the declaration is against both, it is not necessary to enter a discontinuance on the record, as to the party not served with process; if no judgment is rendered against him, this is in legal effect a discontinuance, and the judgment against the defendant before the Court will be regular. [Oliver v. Hutto, 5 Ala. Rep. 211.]

The cases cited from 3d Ala. Reports, show, that as the defendant who was served with process, alone appeared and pleaded, it cannot be inferred from the recital in the judgment, that the other defendant who was no party to the issue, submitted himself to the action of the Court. The case in the fifth volume establishes, that although a party not served with the writ is declared against, yet if no judgment is taken against him, his co-defendant cannot, on error, insist that a discontinuance was entered—the failure to take judgment operating a discontinuance.

The judgment rendered in the present case, must be regarded as a consequence of the verdict, and intended to conform to it, and not affecting other persons than those who were parties to the issue tried. The use of the word "defendants" instead of the singular, *defendant*, according to repeated decisions, will be treated as a mere clerical mistake, upon the principle, that whenever it is apparent that the plural was unintentionally substituted for the singular, or *vice versa*, it shall not affect the regularity of the judgment.

The judgment upon the verdict is the only one that has been rendered, and from what has been said, it results that the assignment of error is not supported by the record. If an execution should be issued against Grayham, it may be superseded on petition, or quashed on motion.

The judgment is affirmed.

SIMONDS v. GULLEY.

1. When a wife by deed of marriage settlement, has property secured to her separate use, through the medium of a trustee, and among such property are several mules, which were on a farm occupied by the husband, at the time of the levy by the sheriff upon a horse belonging to the husband, such horse is not exempt from execution, under the statute permitting every family to retain certain articles.

Writ of error to the Circuit Court of Greene.

Trespass by Simonds against Gulley, for taking and carrying away a horse.

At the trial, the proof on the part of the plaintiff was, that at the time of the trespass complained of, he had a family, and that the horse taken by the defendant was the only one that the plaintiff owned. The defendant showed that the horse was levied on by him, through a deputy, as sheriff of Greene county, by virtue of an execution against the plaintiff, at the suit of one Kerr. It was also shown that at, and previous to, the levy, the plaintiff's wife had a separate estate, secured to her by deed of marriage settlement, which was vested in a trustee for for her exclusive use and benefit, and was not subject to the interference, or control of the plaintiff, and that he had no interest therein; part of this estate consisted of several mules, which were on a farm occupied by the plaintiff, at the time of the levy.

On this proof, the Court charged the jury, that the statute reserving certain property from levy and sale, did not apply to a case where the wife or family of a man had a separate provision made for her or them; that if the jury believed the wife of the plaintiff, at the time of the levy, had a separate estate secured to her, for her use and benefit, and that a part of the estate so secured, consisted of horses, mules or oxen, the plaintiff would not be entitled to recover.

The plaintiff excepted to this charge, and it is now assigned as error.

Erwin, for the plaintiff in error, contended, that the statute was intended to exempt a certain description of property from execution, whenever it was owned by the head of the family; that the control of the separate property of the wife being in a trustee, and not in the husband, it was impossible to say that the husband could use the property as contemplated by the statute; his possession could be determined at any moment by the trustee. Such a construction as would support the charge given, in effect, would be to assert, that if a child, living with a father, as part of his family, owned a horse, this would render one owned by the father subject to execution.

Webb, for the defendant, cited Allen v. Manasse, 4 Ala. Rep. 555, and insisted the statute was only intended for the protection of *families* otherwise destitute.

GOLDTHWAITE, J.—The statute under which the plaintiff here claims exemption for his property from execution, is somewhat peculiar in its terms. It directs that two beds and furniture, two cows and calves, two spinning wheels, two axes, two hoes, five hundred weight of meat, one hundred bushels of corn, all the meal that may at any time be on hand, two ploughs, one table, one pot, one oven, two water vessels, two pair of cotton cards, all books, one churn, three chairs, one work horse, mule, or pair of work oxen, one horse or ox cart, one gun, all tools or implements of trade, twenty head of hogs, one thousand pounds of fodder, one loom, one man's and one woman's saddle shall be retained by, and for the use of, every family in this State, free and exempt from levy or sale, by virtue of any execution or other legal process. [Clay's Dig. 210,

§ 47.] In Allen v. Manasse, 4 Ala. Rep. 555, we were called on to construe the meaning of the term *family*, as it here occurs, and then said, "the exemption is not conferred on the property of every person; and it seems clear that a debtor, merely as such, is not considered; it is only when connected with others, that protection is cast around his property, and this is, that those dependant upon him may not be injured by his destitution." It is impossible, we think, that the legislature intended to protect the property of a debtor, when his wife residing with him, is in the enjoyment and use of the very articles, which it is the chief motive of the statute to prevent the family from being dispossessed of, and thus reduced to a condition of comparative destitution. It cannot be well supposed, that the wife's separate estate, left either in her own or her husband's possession, can remain so, and present a case which the statute intended to provide for. The *family* in this case, has the property retained which the act contemplates, and there is no destitution, whether it belongs to the husband, or is secured as a separate estate of the wife. The statute, it is conceived, will equally protect the wife's separate estate, although she might, by her contracts, subject her property to an execution, or decree in Chancery, if the seizing of any of the exempted articles would leave the *family* destitute. So doubtless, it might, under such circumstances, be seized and sold, if the husband had similar property not subject to the decree against his wife's separate estate.

We are satisfied that the intention of the statute is only to exempt property in cases, when, without the exemption, the family would be destitute.

Judgment affirmed.

EILAND, ADM'R. v. RADFORD.

1. In ascertaining whether a contract is a mortgage, or a conditional sale, the form of the contract will be controlled by the intention of the parties.
2. Some of the tests by which it may be ascertained in a doubtful case, whether a mortgage, or conditional sale was intended, are—did the relation of debtor and creditor subsist before the alledged sale—did the transaction commence by a proposition to lend, or borrow money—was there a great disparity between the value of the property and the price agreed to be given for it—did the vendor continue bound for the debt—these facts, or any of them, if found to exist, go far to show, that a mortgage was intended, and not a conditional sale.
3. A bill of sale, with a defeasance, that if the purchase money is repaid at a stipulated time, the slave will be delivered, is on its face a conditional sale and not a mortgage.

Error to the Chancery Court at Cahawba.

The bill was filed by the intestate of the plaintiff in error, in 1836, and charges, that in 1827, or 1828, he was under the necessity of raising money, and applied to the defendant, who offered to let him have $450, the amount wanted, provided the complainant would give him a *lien* on a negro man, by the name of Uriah. That accordingly, the defendant received the slave and paid him the money, taking a bill of sale, for the slave, and executing at the same time a defeasance to return the slave, if the money was repaid in twelve months. That the intention of the parties at the time, was to create a mortgage, and not to make a conditional sale; that he was forced by his necessities to make the arrangement, and would not at the time, have taken $1000 for the slave. The bill prays an account, &c.

The answer denies all the material allegations of the bill, and insists, that it was an absolute sale of the slave, at a full price, with a right to repurchase.

The bill of sale reads thus:

Dec. 15th, 1829. Received of William Radford five hundred dollars, in full payment of a certain negro man named

Uriah, aged about twenty-five years, which negro I warrant to be sound, and the right forever to defend, from our heirs, assigns, executors, or from any lawful claim from any person; for which consideration we have affixed our hands and seals, the day and date above written.

G. A. MOFFATT, [Seal.]
M. A. LEA, [Seal.]

The defeasance is in these words—

This is to certify, that I oblige myself to deliver to G. A. Moffatt, a certain negro man, named Uriah, which I purchased of him and M. A. Lea, provided, he advances me five hundred dollars, by the 15th of February, 1831.

WM. RADFORD.

Much testimony was taken, which need not here be set out, as the substance of that, which is material, is recited in the opinion of the Court. The Chancellor at the hearing dismissed the bill, from which decree this writ is prosecuted.

EDWARDS, for the plaintiff in error, argued, that this was the case of a pledge for a loan of money, and that the right to redeem was a necessary incident of the contract. That the rule in Chancery was, once a mortgage, always a mortgage; and that it was not the less a mortgage, because the complainant was not liable for the debt. He insisted, that the parol testimony, as well as the written evidence, showed, that this was not a conditional sale, and that the difference in the price asked for the slave, and that received, was a consideration to support the right to redeem. He cited, 2 Johns. Ch. 62; 2 Story's Eq. 297; 1 Johns. Rep. 599; 6 Id. 24; 10 Id. 483; 2 Porter, 426; 5 S. & P. 67; 4 Bibb, 327; 2 Cowen, 324; 3 Yerger, 525; 3 J. J. M. 356; 1 Vesey, 406; 1 Peere Wms. 290; 2 Vernon, 84; 1 Powell, 373.

J. B. CLARKE, contra. All the material allegations of the bill are denied, and the proof taken in the cause, so far from sustaining the bill, supports the answer, and establishes, that it is the plain case of an absolute sale, with a right to repurchase. He cited, 4 Kent's Com, 144; 2 Porter, 414; 7 Cranch, 218; 2 Edwards, 138; 2 Am. Eq. Dig. 182; 1 Dev. 373; 5 Leigh, 434; 5 S. & P. 80; 5 G. & J. 76.

ORMOND, J.—The bill is filed for the purpose of redeeming a slave, alledged to have been mortgaged by the complainant's intestate, to the defendant, and for an account. It is not alledged, that there was a technical mortgage executed between the parties, but it is insisted, that the bill of sale, considered in connection with the defeasance, establishes, that the transaction was either a pledge of the slaves, or a mortgage, as it shows, that there was a right to redeem, and that such was the intention of the parties.

The answer denies all the material allegations of the bill, and insists, that it was an absolute purchase of the slave, with a right secured to the plaintiff to repurchase, at a stipulated time. The bill of sale, and defeasance, when considered together, do not in our opinion, establish the proposition, that this was either a pledge, or mortgage. The bill of sale is in the usual form, and the defeasance recites the purchase, and promises to deliver the slave to the vendor, provided he advances five hundred dollars, which was the amount of the purchase money as recited in the bill of sale, by the 15th February, 1831. This, upon its face, imports a conditional sale of the slave, but as it has been held by this, and other Courts, that a deed absolute on its face, may, by parol, be shown to have been intended by the parties to operate as a mortgage, we proceed to consider the evidence taken in the cause.

Before proceeding to the examination of the testimony, it is proper to remark, that whether this contract is to be considered as an absolute sale, with a right to repurchase, or a pledge, or mortgage, depends upon the intention of the parties, to be ascertained by the circumstances attending the transaction; and although it is difficult to establish fixed rules, by which to ascertain the true character of such contracts, there are some tests which may be successfully applied in doubtful cases. Among these, the following may be mentioned: Did the relation of debtor, and creditor, subsist before the alledged sale? Did the transaction commence, by a proposition to lend, or borrow, money? Was there a great disparity between the value of the property, and the price agreed to be given for it? Did the vendor continue bound for the debt? When any of these facts are found to exist, they go far to show, in a doubtful case, that a mortgage was intended, and not a conditional sale.

From the evidence, it appears, that the proposition came from the complainant, who, in company with another person, went to the house of the defendant to sell the slave. The price he put upon the slave was $550. The defendant would not give more than $500, which the former agreed to take, provided he had the privilege of *redeeming* him, in twelve, or fourteen months, which was assented to, the negro delivered, and the money paid; $400 at that time, and the residue soon after. Several witnesses who were examined, say, that the slave was not worth more than $500 at the time of the sale. One witness, Martin A. Lea, who joined the complainant in making the bill of sale, says, he was worth from five to six hundred dollars. In addition, the complainant stated, the day after this transaction, that he had sold the slave to defendant.

It is impossible, we think, to come to any other conclusion, than, that this was an absolute sale, with the right of repurchase. The witness who was present at the time of the sale, says, it is true, that the complainant was to have the right to *redeem*, but that he did not use this term in its technical sense, is evident, as he says, there was no contract between the parties, but that disclosed by the written agreement. The price given, appears to have been a fair price for the negro at the time; and during the time, within which the repurchase could be made, the defendant encountered the risk of the death of the slave, without any corresponding right of getting back the purchase money. It is therefore, we think, perfectly clear, that the parties understood it to be a conditional sale, and if any doubt could remain, it would be removed by the deposition of the witness, Hinton, who deposes, that about the time when the privilege of repurchasing the slave was about to expire, the agent of the complainant offered to sell him to the witness at $550, observing, that if he was not sold the defendant would get him for $500. See the case of Poindexter v. McCommon, 1 Dev. Eq. Rep. 373, and Kroesen v. Seevers, 5 Leigh, 434.

It is indeed difficult to suppose, in any case, where the property supposed to be mortgaged, is of a perishable nature, as slaves, that a mortgage is intended by the parties, when the supposed mortgagor does not continue bound for the purchase money, and the contract therefore destitute of mutuality. See

the remarks of Judge Pendleton in Chapman v. Turner, 1 Call, 293. In every view we can take of this case, we are clear that the parties did not intend to create a mortgage.

Let the decree of the Chancellor be affirmed.

THE STATE v. PIERCE.

1. In an indictment for malicious mischief in killing a domestic animal, the name of the owner should be disclosed, or it should at least be stated that the animal *was the property of some one*, though the name was unknown; if there was no known proprietor, the killing will not constitute malicious mischief.

THE defendant was indicted in the Circuit Court of Randolph, for unlawfully, wilfully, and maliciously, killing, by shooting with a rifle gun, a certain spotted bull of the value of twenty dollars, belonging to some person to the jurors unknown. To this indictment was entered the plea of not guilty, and the issue being submitted to a jury, a verdict of guilty was returned, and judgment rendered accordingly for the fine assessed, of twenty- five dollars, &c.

At the request of the defendant, certain questions were referred, as novel and difficult, to this Court, for its decision, which may be thus stated, viz: 1. The killing of the animal referred to in the indictment, was proved, but there was no proof of his ownership, or that he belonged to any body; he had been at large in the neighborhood for several years, without any owner or claimant. There was no proof of malice towards any one, but there was some evidence of the mischievous character of the animal, and of particular acts of mischief. The Court charged the jury, that the killing of the animal described by one not its owner, would make out the offence charged, unless the defendant satisfied them he had provocation. If

it was shown by the proof, either that the bull was a mischievous animal, or had done, or offered, injury to the defendant, then they would be justified in considering that proof, in order to determine whether the defendant had acted cruelly or wantonly; and if they were convinced that the act was not committed under the influence of such feeling, then they should find for the defendant. *Further*, the Court charged, that malice would be inferred from the killing, unless the defendant showed a provocation. 2. It was moved in arrest of judgment, that the indictment was insufficient, but this motion was overruled.

G. W. Gunn, for the defendant, contended, that it was essential to the indictment, that it should have alledged who was the owner of the animal, with the killing of which the defendant was charged. The proceeding, though in form criminal, is yet intended for the benefit of the party aggrieved, and his name should be disclosed, that it may be seen who is entitled to the fine—and his name must be known, (at least to the accused,) or there can be no malice cherished towards him. [Clay's Dig. 417, § 5, 418, § 7; The State v. Garner, 8 Porter's Rep. 447.] Malice is a necessary ingredient of the offence; this is abundantly shown by the construction placed upon English statutes similar to our own. [Arch. Crim. Pl. 283; King v. Austin, 1 Eng. Crown Cases, 490; 2 Easts C. L. 1072-3.] Mere wantonness, or cruelty, will not sustain an indictment for malicious mischief.

Attorney General, for the State, made the following points: 1. If the indictment cannot be supported under the statute, it is good at common law, and malicious mischief is an offence independent of statute. [1 Dall. Rep. 335; 1 Mass. Rep. 58; 5 Cow. Rep. 259; 1 Aik. Rep. 226; 1 P. A. Brown's Rep. 251; 1 Ov. Rep. 305; 19 Wend. Rep. 419; see also the form of an indictment in 3 Chit. C. L.; 2 Easts C. L. 1074; State v. Wheeler, 3 Verm. Rep.

2. The charge of the Court was correct; for several of the above citations will show, that proof of express malice is not necessary, but is inferable from the wilfulness, wantonness and cruelty of the act. Under the statute of 9 Geo. 1 Chap. 22, it has been held that malice is necessary to constitute the offence;

but it must be recollected that the offence punished by that act is made "felony without the benefit of clergy," and stricter proof of course would be required than in the present case, where the offence is a mere misdemeanor. The common law declares, "that every act of a public evil example, and against good morals, is an indictable offence;" and this principle embraces the case stated in the indictment.

COLLIER, C. J.—It is enacted by the fifth section of the fourth chapter of the Penal Code, that "If any person shall unlawfully, wilfully, and maliciously kill, or disable, any horse, mare, or gelding, colt or filly, ass or mule, or any goat, sheep, or cattle, or any hog or live stock, of any kind or description whatever, belonging to any other person; or shall," &c. "every person so offending, shall, on conviction of any of the aforesaid offences, be fined in a sum equal to five fold the value of the property injured or destroyed," &c. The seventh section of the same chapter provides, that "the fines imposed in the three last preceding sections, for the offences therein mentioned, shall be paid to the party injured." [Clay's Dig. 417-8.]

The 9 Geo. 1, ch. 22, commonly called the Black Act, declares, "If any person or persons, whether, &c., shall unlawfully and maliciously kill, maim, or wound, any cattle, or shall, &c. every person so offending, being lawfully convicted thereof, shall be adjudged guilty of felony without benefit of clergy," &c. It was the settled construction of that statute, that in order to bring an offender within its provisions, malice must be directed against the owner of the cattle, and not merely against the animal itself. [2 Easts Crown L. 1072-4.] In Shepherd's case, 2 Leach's C. L. 609, it was held, that proof of dislike to a particular horse, and the mischief committed after the master's refusal to let him have another, was not sufficient to bring the case within the Black Act; though the prisoner had before threatened the injury, if his master would not let him have the other horse.

So it has been determined that an indictment at the common law, would not lie for unlawfully, and with force and arms, maiming a horse, to the great damage of his owner, and against the peace. Such charge, it was adjudged, only imported a trespass—the words *vi et armis* not implying sufficient force to support an indictment. [2 East's C. Law, 1074.]

The construction placed upon the English statute has never been departed from by the Courts of that country. True, the law in respect to malicious mischief has been remodelled by the 7 & 8 Geo. IV. c. 30; the 25th section of which enactment declares, that the offences denounced shall be punished, whether they were "committed from malice conceived against the owner of the property," or not. [Step. Crim. L. 191, 203.] The terms employed by the Black Act, of which malice is predicated as a constituent of the offence, are not more potent than those employed in our statute, but are substantially the same, if not identical. Our first act upon the subject of malicious mischief, as well as that we have cited from the "Penal Code," were both passed in reference to the English statute, and long after its construction had been settled and known. This being the case, it is proper, that the interpretation of the latter, so far as the phraseology of our statute makes it applicable, should exert a strong, if not a controlling influence. Hence we have no doubt that malice against the owner of the animal, alledged to have been killed, is an essential element of the statutory offence. From this view of the law, it would seem necessarily to follow, either that the owner's name should be disclosed in the indictment, or that it should at least be stated that the animal was the property of some one, whose name was unknown. The evidence should show that there was an owner, and who he was, but it is not indispensable to a conviction, in such case, that the defendant, previous to the commission of the act, declared a purpose to injure the owner, or did, or said, any thing, either before, or after, indicative of express malice. Malice is inferable, frequently from the circumstances under which the mischief was committed; thus if the act was committed wantonly, when the defendant was cool, or if excited, was angry without a cause, or his anger proceeded from a cause which could not naturally have manifested itself in the violence done. In these and other cases, the jury would be authorized to imply malice, and find the accused guilty.

It results from this view, that the indictment is defective, and the ruling of the Court was not in harmony with the law. The judgment of the Circuit Court is therefore reversed, and the defendant will appear at its next term, and answer such further charge, (if any,) as may be made against him; unless he shall be otherwise legally discharged.

MAHONEY v. B. & J. CHANDLER.

1. It seems that when two workmen agree with a third person to build a dam and mills, the mills to be built by one, and the dam by the other, and the whole work to be paid for out of the profits of the mills for one year, no action between the workmen can be brought on this contract for a failure or violation of it.
2. When the plaintiff asks and obtains leave to be *nonsuit*, he will not be heard to assign error upon the exclusion of evidence.

Writ of error to the Circuit Court of Benton.

ASSUMPSIT by Mahoney against Barley Chandler and James Chandler. The declaration describes a contract between the parties in which the defendants on consideration that the plaintiff agreed to rebuild the saw mill and forebay, at such place as might be selected, and furnish the husk frame and running gear of the grist mill, and to have both of the mills in operation by the month of February next, following' the agreement undertook and then and there faithfully promised the plaintiff to build a good dam on the creek at Nisbet's mill place, on the same foundation whereon the old one stood, of sound large timber of sufficient height to turn the water into the race, and sufficiently strong to breast the water. The breach is laid that the work was not performed in the manner agreed, but that the dam was so negligently built as to be wholly unfit for the purpose designed and intended; whereby the plaintiff lost all the profit, benefit and advantage, &c. &c.

At the trial, upon the general issue, the plaintiff offered certain articles of agreement, entered into between John Nisbet of the first part, the defendants of the second part, and the plaintiff of the third part, by which the defendants bound themselves to build a mill dam in the terms set out in the declaration. The plaintiff was to perform the work, stated in that connection in the declaration; and Nisbet was to furnish the materials necessary for the *same;* that is, to rebuild the saw mill and forebay, and to finish the husk frame and running gear of the grist mill.

The agreement then proceeds as follows:

"The said Chandlers for the services aforesaid, are to go into possession of said mills for the year 1843, and retain three-fifths of the profits of the saw mill, and three-fourths of the grist mill, and to pay over or account to Mahoney at the end of each quarter for his services, one-fifth of the profits of the saw mill, and one-fourth of the grist or grain accounts or lumber, the kind he may require." There are some expressions in the written contract, which leave it doubtful, whether the timber for the dam, as well as for the mills, was not to be furnished by Nisbet.

The Court excluded this agreement from the jury, and the plaintiff excepted.

Afterwards, as the judgment entry recites, he asked and obtained leave to take a nonsuit, and judgment to that effect was given. The plaintiff now prosecutes this writ of error, and assigns that the Court erred in excluding the agreement offered as evidence.

S. F. Rice, for the plaintiff in error, cited Hill v. Bishop, 2 Ala. Rep. 320; 3 Porter, 231; Bell v. Rhea, et al. 1 Ala. Rep. N. S. 83; Wainwright v. Townsley, 1 Stew. 29.

T. A. Walker, insisted, there was no error in excluding the agreement as the contract was not made between these parties, but between them and Nisbet. However, this might be, the plaintiff cannot review the error, as afterwards he consented to be nonsuited. [Cain v. Byrd, 1 Stewart, 189.]

Rice, in reply argued, that the nonsuit was the consequence of the previous exclusion, and therefore it ought not to prejudice the plaintiff. [Leavitt v. Friou, 4 Ala. Rep. 335; 6 Ala. Rep. 226.]

GOLDTHWAITE, J.—We should be inclined to think that no action could accrue to Mahoney on the contract offered in evidence against the Chandlers, because they do not contract with him, but with Nisbet. It is the case of two sets of workmen, contracting with their employer, and providing for payment for their services out of the thing to be made. It is true, that Mahony was to be paid in a particular manner, out of the profits of the mills, but this does not, as it seems to us, make

the Chandlers responsible to him for not building the dam; for the contract to build that was made with Nisbet, who is not a party to this action. However, this may be, the plaintiff cannot now review the error, as he consented to be nonsuited. [Cain v. Byrd, 1 Stew. 189.] To enable him to review a judgment upon the exclusion of evidence, the plaintiff must risk the chance of a verdict. This case does not resemble that of Leavitt v. Friou, for there the party refused to proceed further, and the Court disposed of the case, upon that refusal, and not with his assent as the entry shows was done here.

Judgment affirmed.

DUNLAP v. FOSTER.

1. When a judgment is obtained against a principal, and his sureties, and the property of the principal is levied on for its discharge, a third person who become bound in a delivery bond for the forthcoming of the property, and it not being delivered, has the debt to pay, cannot look to the sureties for contribution.

Error to the County Court of Tuscaloosa.

This was a motion by the defendant, against the plaintiff in error. The record discloses, that Dunlap and Miller, were the sureties of one Lee, to the State Bank; that the Bank, by motion, obtained a judgment against Lee, and his sureties. That execution issued thereon, and was levied on certain slaves, the property of Lee. That Lee gave a forthcoming bond to the sheriff for the delivery of the slaves, on the day of the sale, with Foster as his surety. That the bond was forfeited, and that execution issued thereon against Foster, as well as the parties to the original judgment, and the money being made out of Foster, he sought to recover contribution from Dunlap & Mil-

ler, as co-securities with him for Lee. The Court rendered judgment against the plaintiff in error, for one third part of the amount of judgment—from which he prosecutes this writ.

PORTER, for the plaintiff in error. If this motion can be sustained, it must be by authority of one of the statutes giving the right to this remedy; but none can be found authorizing a remedy by motion in such a case as the present; because, in truth, Foster was the surety of Lee, and not the co-surety of the plaintiff in error.

P. MARTIN, contra, contended, that Foster was either co-surety with the original sureties of Lee, or else they stood towards him in the relation of principal, and in either event this motion was sustainable.

ORMOND, J.—A surety does not lose his distinctive character, or forfeit the rights which spring from that relation, by a judgment being rendered against him, jointly with his principal, as was held by this Court, in the case of Carpenter v. Devon, 6 Ala. Rep. 718.

Notwithstanding, therefore, a judgment was obtained against Lee, and his sureties by the Bank, the relation of principal and surety still existed between them, and they do not therefore stand in the relation of principal, to Foster. Are they co-sureties with him, for the principal debtor?

It is not necessary to create the relation of co-surety, that those standing in that relation, should have become bound for the principal debtor by the same instrument, or at the same time; if it is the same transaction, and they have a common interest, or a common burthen to bear; as was held in the case of Deering v. Winchelsea, argued in the Exchequer Chamber, 2 Bos & P. 270. The reason is, that the right to contribution is not founded on contract, but arises from equitable considerations, growing out of the relation of suretyship, where the sureties have not by contract, stipulated for the measure of the obligation, that shall exist between them, as to contribution. See the observations of Lord Eldon, Cooper v. Twineam, T. & Russ. 426.

The question then, here, is, are these parties sureties in the same transaction; it is only necessary to advert to the facts of

the case, to see, that they are not. They are not only not sureties in the same transaction, having a common interest, and a common burthen, but their interests are, if not absolutely antagonist to each other, at least dissimilar. After the judgment was obtained, and the levy made on the property of the principal, the sureties had a direct interest that the property should be sold, for its discharge. This, the defendant in error prevented, by becoming bound for the delivery of the property to the sheriff on the day of sale, thereby causing its return to the principal, and thus enabling him, as the event has proved, to disappoint the expectations of the sureties. These two acts are clearly not the same transaction, but separate and distinct. Miller & Dunlap were sureties for the payment of the debt to the Bank; Foster was surety for the principal, that he would produce the property on the day of sale, to satisfy the execution; and his principal having failed, he cannot look to the sureties for the payment of the debt to the Bank, for contribution.

From this, it results, that the Court erred in its judgment, which must therefore be reversed.

HARRISON, ET AL. EX PARTE.

1. An order of the Orphans' Court requiring the shares of several distributees, in the slaves of an intestate's estate to be set apart and allotted to them pursuant to their petition—appointing commissioners to make distribution accordingly—and directing *further*, that the administrator should produce the slaves required by the commissioners, and afford all necessary facilities for making the division, is such a final order within the statute, as may be revised by writ of error.

THE petitioners represent that they are entitled to five-eighths of the personal estate of R. B. Harrison, deceased, and that the

remainder belongs to Kirkland Harrison, the administrator, James Harrison, and the representatives of Mary Moores, deceased. That it appears from the inventory returned by the administrator, to the Orphans' Court of Dallas, and other evidence, that the estate consisted of about one hundred and eighty slaves, besides other personal assets, amounting to thirty or forty thousand dollars, &c.

The petitioners had heretofore united with James Harrison, Charles Moores, and Mary, (the wife of the latter, since deceased,) in a bill in Chancery, and obtained an injunction to restrain the administrator from selling the slaves belonging to the intestate's estate, as he proposed to do, in January, 1844, under an order of the Orphans' Court. This injunction still continues in force.

It is also stated that the petitioners united in an application for the distribution of the slaves, horses and mules of intestate's estate. The distribution was opposed by the administrator, although more than eighteen months had elapsed from the grant of administration, upon the ground of the previous order of the Orphans' Court to sell the slaves, the pendency of the injunction, &c. In compliance with the application for a distribution, the Orphans' Court, in December, 1844, ordered that the slaves only be distributed, so as to allot to the petitioners their respective shares thereof, the remainder of the slaves to continue in the hands of the administrator, until the other distributees should ask their portions to be set apart. It was further declared, that a paper set up by the administrator as a will of the intestate, is illegal on its face, and consequently was null and void. The commissioners appointed to carry into effect the order of the Orphans' Court, were required to report their proceedings under the same, to that Court, on the first Monday in January, 1845. It was also provided by the order, that the proportion of each distributee should be particularly defined; that the administrator should produce the slaves when required by the commissioners, and afford them all necessary facilities for making the division. Of this order notice was given to the administrator and commissioners, but not sufficiently early to enable them to execute it, and make report, as required.

On the sixth day of January, 1845, the Orphans' Court, at

the instance of the petitioners, renewed the previous order of distribution, so as to give further time for its execution; and on that day the administrator sued out a writ of error, returnable to the term of this Court, to be holden in June next, and having executed a bond, with sureties, in the sum of $10,000, a *supersedeas* has been issued, to suspend all proceedings upon the order of distribution.

To sustain the facts above stated, the petitioners refer to a transcript of the record of the proceedings in the Orphans' Court, which accompanies their petition, and pray that a *mandamus*, or other appropriate process, issue to the clerk of the Orphans' Court, directing him to disregard the writ of error and *supersedeas*, and issue a citation to the administrator and commissioners, that the order of distribution may be executed.

R. Saffold, for the petitioners, insisted, that the order of the Orphans' Court was merely interlocutory, and a writ of error would not lie thereon. [Russell and others v. Pierce, 7 Porter's Rep. 276; Merrill v. Jones, 8 Id. 554; Miller v. Goffe and others, 9 Id. 265; Jones, ex parte, 1 Ala. Rep. N. S. 15; Wade v. Judge, 5 Id. 131; Ex parte, Sanford, Id. 562.] *Further*, a *mandamus* is the proper remedy. [Ethridge v. Hall, 7 Porter's Rep. 47; McRea v. Bank of Columbus, 1 Ala. Rep. N. S. 578; Ex parte, Rodgers, 7 Cow. Rep. 526; Walden v. Lee, 5 Pick. Rep. 323.]

C. G. Edwards, contra, contended, that as it respected the slaves of the intestate's estate, or, rather, the petitioners' shares, the order of the Orphans' Court was final. He cited Clay's Dig. 297, § 4, 307, § 6; 9 Porter's Rep. 111; 3 Ala. Rep. 156, 434.

COLLIER, C. J.—It is provided by statute, that from any judgment, or order final of the Orphans' Court, whether in vacation or term time, an appeal or writ of error, shall lie to the Circuit or Supreme Court, in the same manner as upon judgments of the Circuit Courts. [Clay's Dig. 297, § 4.] The important inquiry in the present case is, whether the order of the Orphans' Court is final, within the meaning of the act cited.

The case of Merrill v. Jones, 8 Porter's Rep. 554, is supposed by the petitioners' counsel, to be similar to the one before

us. There, it was alledged, that the administrator had not made a true inventory of the intestate's estate, but had omitted to return several negroes, &c., and that the negroes had been carried away from the premises of the deceased by him. The administrator affirmed that the negroes were not the property of the estate, and a jury were impanneled to try the issue, who found that they were subject to distribution. Thereupon the Court ordered the administrator, to distribute the slaves among the distributees. This Court held, that the decree of the Orphans' Court merely directed the administrator to proceed to make distribution according to the statute, of the slaves ascertained to belong to the estate. "Whatever may be the merits or demerits of these proceedings, the decree is not a final settlement of the estate; no distribution was actually made, nor was there a decree ascertaining how much is due to each distributee, or to the defendant in error as the sole distributee."

The decree in that case merely directs the administrator to distribute the slaves, that is, to proceed in the performance of this duty as the statute directs. Some further proceeding was necessary, to ascertain, and recognize the distributees, to adjust their respective proportions, to appoint the commissioners to distribute, &c. But in the case at bar, all this was determined and settled by the order, and the shares of the petitioners were merely to be particularized by the commissioners, and the slaves set apart to each, delivered. This, by analogy to a decree in Chancery, is *pro re nata*, definitive of the rights of the parties. In Weatherford, et al. v. James, 2 Ala. Rep. 170, we say, that a decree is final which settles the rights of the parties in litigation, although it contain a reference to the master, to take an account and report what is due to the complainant. This conclusion has been repeatedly reaffirmed by us, and seems to be well supported by authority.

To make the order final, it is not necessary that all the distributees should have united in the application to the Orphans' Court; each distributee may proceed separately, and obtain a final decree in his favor. This is authorized by statute in a proper case.

Having determined that the order is final, the right of the administrator to sue out a writ of error follows as a consequence. The question then, as to the right of the distributees

to an allotment of their shares, eighteen months having elapsed since the grant of administration, need not now be considered. But we would remark, that in Leavens v. Butler, et ux. 8 Porter's Rep. 380, we held, that a legatee cannot, in all cases, immediately after the expiration of that time, coerce the payment of his legacy. Whether the law is the same in respect to a distributive share, we will not inquire.

It results from what has been said, that the prayer of the petitioners must be denied.

VAUGHAN, ET AL. v. SEED.

1. The act of 1843 which directs appeal and certiorari cases, then pending in the Circuit Court of Mobile county, to be returned to the County Court, does not call upon the Court to repudiate an appeal cause of its own mere motion; and when a case depending in that Court, at the passage of the act, is determined there without objection, the judgment will not be reversed.

Writ of error to the Circuit Court of Mobile County.

Suit was commenced by Seed against Vaughan in a justice's Court, when the plaintiff had judgment, and the defendant appealed to the Circuit Court. There the cause was tried upon allegation and issue, and a verdict rendered in favor of Seed, against Vaughan, on which judgment was given against him, and also against Magee, as his surety for the appeal bond.

The suit was commenced in September, 1842, and the appeal taken the 8th of October of the same year.

It is now assigned as error, that the Circuit Court had no jurisdiction of the appeal.

Campbell, for the plaintiffs in error, cited, act of 1842, P.

P. 148; 7 Monroe, 222; 3 Ala. Rep. 707; 5 Am. Dig. 167; 5 H. & J. 36; 1 J. J. M. 476.

No counsel appeared for the defendant.

GOLDTHWAITE, J.—The third section of a statute approved the 14th of February, 1843, directs, "that all appeals from justices of the peace, and all cases pending on *certioraris* in the Circuit and County Courts of Mobile county, and all cases of appeal or *certiorari* to justices of the peace, that might thereafter arise in said county, shall be returned into the County Court of said county, and shall be heard and determined at the special terms of the said County Court, which are holden for the decision of cases in admiralty." The plaintiffs in this Court contend, that the effect of this act is, to deprive the Circuit Court of all jurisdiction over cases, such as are named, and consequently, that any judgment rendered by the Circuit Court, in such a suit as this, must be held erroneous, independent of all other circumstances.

We have no doubt that the section we have quoted from the statute, was intended to relieve the Circuit Court from the adjudication of the classes of suits named in the act, as well as to prevent the accumulation of costs to suitors, generally in indigent circumstances: but there is nothing in its terms to require the reversal of a judgment, when the cause in the first instance was properly appealed and returned to that Court; and when, in addition to this, both parties, as well as the Court, have acquiesced in retaining and trying the cause in that Court. It appears that this appeal was taken in October, 1842, and was determined upon a verdict in December, 1843. So that it was regularly in the Circuit Court when the act referred to was passed. We do not think it was incumbent on the Court of its own mere motion to repudiate the cause, and neither party having demanded its transfer to the County Court, there seems to be no just cause to reverse the judgment.

Judgment affirmed.

MOORE, ET ALS. v. CLAY.

1. A Court of equity may relieve against the fraudulent silence of the vendor, by which the vendee, failed to obtain a portion of the land he supposed he was buying, and the vendor was selling.
2. M. offered for sale, to C., his tract of land, lying in Ashburn Cove, containing about nine hundred and eighty-two acres, at $8,000, and a day was appointed for its examination. C. accordingly went, and distrusting M. procured one of the neighbors, to show him the lands. The next day the parties met to close the contract, and upon C. putting down the different parcels, amounting to nine hundred and twenty acres, remarked to M. that there was not as much land, as he had represented—to which M. replied, by asking him if it was not worth what he asked for it: *Held*, that as it was satisfactorily shown, by the circumstances, and by the proof, that M. knew, that C. had omitted a portion of the tract, he supposed he was buying, his omission to disclose the fact, was a fraudulent concealment, and that a Court of equity would relieve against it.
3. A purchaser who buys land previously purchased by another, pays the purchase money, and obtains his title, before he receives notice of such prior purchase, will be protected in equity. These facts he must alledge in his plea, or answer, whether he is charged in the bill with notice, or not, and must deny notice down to the time of the payment of the purchase money, and the execution of the deed, or he will be held a purchaser with notice of the previous sale.
4. A record of the Orphans' Court cannot be collaterally impeached, if the Court obtained jurisdiction to make a division of real estate, proceeded to render a final decree, and the commissioners in fact made a division.
5. Where one purchases land and pays the purchase money, and is afterwards held to be a purchaser with notice of a prior purchase, a Court of Chancery is not compelled to decree the purchase money unpaid, to the vendor, and the rents and profits to the vendee, but may decree that these sums shall *pro tanto* extinguish each other, and put an end to the litigation, by decreeing also as between the defendants.

Error to the Chancery Court of Madison.

The bill was filed by the defendant in error, and alledges, that on and before the 12th of October, 1833, there was in contemplation between William H. Moore, and complainant, a contract, by which he was to purchase of the former, his several tracts, or parcels of land, including the lands purchased by him of the heirs of Daniel McDuff, containing about nine hundred and eighty acres, (which are described,) and including a lot

of sixty-two acres, which Moore had purchased of the heirs of McDuff, for which he was to pay the sum of eight thousand dollars, in four payments. That on the day aforesaid, the purchase was completed, and a memorandum in writing executed, setting forth the lands sold, and the terms of the sale, but by the mistake of complainant, and the fraud of Moore, the tract of sixty-two acres was omitted. That on the 30th October, 1833, Moore and wife, executed to him a deed for the lands, in which the tract of sixty-two acres were also omitted, and that he did not discover the mistake, until after the execution of the deed, although it was well known to Moore. That he did not discover the omission in the deed, until December, 1833, when he demanded of Moore to convey the sixty-two acres to him, which the latter refused.

That some time after the purchase by complainant, Moore sold the sixty-two acres of land, to Robert Freeman, who purchased with knowledge of complainant's right. That Moore and Freeman, have been ever since in possession of the land, which is equal in quality to the residue of the tract. That Moore and himself agreed to leave the controversy to the arbitrament of attorneys of the Supreme Court, to be chosen by the parties; and that testimony might be taken by either party on notice, and admitted the existence of certain facts as the basis of the arbitration. The agreement bears date the 1st November, 1834, but need not be here set out, as it is adverted to, in the opinion of the Court. The arbitration was not made from the omission of Moore, to appoint a referee, though one was appointed by complainant.

The prayer of the bill is for a title to the sixty-two acres.

Moore in his answer, denies that he sold the sixty-two acres claimed in the bill. Admits he stated in a previous conversation, that he had about nine hundred and eighty acres of land for sale, for which he was willing to take $8,000. That when complainant examined the land, he did not ask respondent to show it, but relying on the examination he had made himself, and with full knowledge of all the facts, and the declaration of respondent at the time, that he had not yet obtained title for this sixty-two acres, he entered into the written agreement for the purchase of the nine hundred and twenty acres. Subsequent to this, respondent obtained a deed from McDuff for

the sixty-two acres. He denies that there was any contract previous to the written agreement. He admits the admissions made by him of facts, but insists they are not binding on him, as they were not acted on, and were obtained from him, without a knowledge of their import, and were made with reference to an amicable adjustment, &c.

Freeman answers, and admits the purchase of the land from Moore, for which he says, he paid a full and valuable consideration, and denies that at the time of his purchase, he knew that complainant had any claim to the land in question, and denies all fraud or collusion.

A supplemental bill was filed by the complainant, in which he alledges, that when Moore sold the land to him, and made him a deed therefor, and also when he sold to Freeman, that he had not the legal title to the sixty-two acres, described in the original bill. That although he had previously purchased it from R. McDuff, had paid him for it, and obtained possession of it, yet, that by mistake, McDuff conveyed to him a different piece of land. That McDuff is dead, leaving infant heirs, who are named and made parties. The prayer of the bill is, that they be compelled to convey the title to complainant.

The heirs, so far as they answered the bill, do not admit the allegations of the supplemental bill, and require proof.

A bill was also filed for an injunction, against the collection of $500, part of the purchase money, remaining unpaid.

The Chancellor, at the hearing, considering the allegations of the bill, and supplemental bill, as established, and that the complainant was entitled to the relief he sought, decreed, that the title to the sixty-two acres be divested out of McDuff's heirs, and vested in the complainant, and referred it to the master, to state an account between the parties, who reported, that complainant was indebted to Moore on account of the purchase, $803 33, and was entitled to recover for rent, $805 17, which was approved and confirmed by the Chancellor.

From this decree, the defendants prosecute this writ, and assign many errors, which are noticed in the opinion of the Court.

Robinson, for the plaintiffs in error, argued, that the effect of the bill, was to enforce a parol contract for the sale of lands,

when all the evidence in the cause showed, that there was no contract whatever for the sale of the land, until the written agreement was entered into, and parol evidence is inadmissible to contradict that agreement. [1 Fonb. 200, note O; 2 Atk. 383; 3 Id. 8; 3 H. & M. 388; 2 Vesey, 417; 1 Johns. Ch. 428; 1 H. & B. 659; 5 Rep. 25; 2 Br. C. C. 218; 7 Vesey, 218; 4 Taunt. 786; 1 Phil. Ev. 567; 3 Ib. 1466, note 984.]

This objection appears upon the bill, and the statute of frauds need not be pleaded. [Story E. P. 389.] Where a complainant seeks to rectify a written agreement, varied by fraud, mistake, or surprise, and then enforce the agreement in its new form, the statute of frauds will bar relief.

But there is no fraud shown. Clay did not rely upon Moore, but examined for himself, and there was no obligation upon Moore, to apprise him of his mistake. [Sug. Ven. 2, 6 Am. from 10 Lond. ed.; 1 Story Eq. 216, 206, 201, 159; 1 Fonb. 379; 1 Ala. Rep. 168; 2 Id. 635; 5 Id. 593.]

The admissions of Moore, made after the sale, were insufficient to make out the case, nor could it be made out by that kind of testimony. [2 Johns. Ch. 630, 585; 6 Vesey, 328; 1 Brown, C. C. 92; 3 Id. 168; 1 Vesey, 241; 4 Dess. 211; 1 Wend. 625; 6 Id. 268; 1 Bibb, 611; 2 Id. 311; 5 Martin Lou. N. S. 18; 6 Monroe, 136; 2 J. J. M. 65; 4 Id. 101.]

The fact that Clay did not attempt to take possession of the sixty-two acres, shows that he waived his right to it, or renders it incredible that he supposed he had purchased it. [3 P. Wms. 193; 1 Vesey Jr. 226; 12 Id. 27; 11 Id. 464; 2 Swanston, 222; 3 Id. 168; 4 B. C. C. 495; 4 Rand. 478; 3 Merivale, 53, 124; 10 Vesey, 505.]

The deposition of Bradley should have been rejected, because the bills and notes were not produced.

The Chancellor allowed more for rent than was charged in the bill, to be the value of the lands. [9 Cranch, 19; 7 Wheaton, 522.]

Freeman denies notice—the bill itself could not be notice of facts happening previous to service of subpœna. The deposition of Moore to prove that Freeman was a purchaser, for a valuable consideration, should have been received, as his interest was precisely balanced between Clay and Freeman.

The transcript from the Orphans' Court, showing the divi-

sion between the heirs of McDuff was utterly void, and therefore, the Court cannot divest the title of the heirs of McDuff.

Hopkins and McClung, contra. The offer of Moore was to sell a particular tract of land. Clay examined the tract, and was willing to purchase it, under the impression, that it contained the tract of sixty-two acres purchased from McDuff, although he then supposed it contained but nine hundred and twenty acres. Moore was aware of the mistake, into which Clay had fallen, and did not correct it, but suffered him to go on, and complete the purchase. This was a fraud, which Chancery will relieve against, against Freeman, as well as Moore, if the former purchased with notice of complainant's equity. [3 Peters, 210; 1 Story Eq. § 156–9, 158, 160, 201; § 192, 204.]

Freeman upon his answer must be treated as a purchaser with notice. He does not alledge, whether the title he obtained was legal or equitable. [Sugden on Ven. 543, 555.] Nor what consideration he agreed to pay for the lands. Nor that he paid any part of it before notice. [2 Atk. 631; 7 Vesey, 290; 1 Johns. Ch. 566; 8 Wheaton, 449; 10 Peters, 179; 1 H. & J. Ch. 261; 5 S. & P. 215; Mitford's Pl. 222.]

Having in his answer alledged that he paid the purchase money to Martin & Pleasants, he could not afterwards prove that he paid it to Moore, admitting Moore to be competent. But Moore does not state when the money was paid. [Gressly Eq. Ev. 9.]

If Freeman purchased without notice of Clay's equity, he had but an equity himself, and being acquired subsequent to that of Clay, must yield to it. [10 Peters, 179, 210; 2 Fonb. 301.]

Moore was not a competent witness. [2 Johns. 394; 4 Id. 293; 6 Id. 523.]

The transcript of the record from the Orphans' Court, is ample to show a division of the land, and that the sixty-two acres was allotted to R. McDuff, and cannot be impeached collaterally. [6 Porter, 219.]

The last bill alledges the payment of all the purchase money but $500, and not being answered by Moore, is evidence against him as an admission. [3 Porter, 125; 1 Id. 375; 1 Bibb, 466; Clay's Dig. 554.]

The admission of Moore upon the submission to arbitration, was evidence against him. [4 Phil. Ev. 10; 2 Pick. 285; 4 Id. 377; 21 Eng. Com. Law, 355; 22 Id. 439; 1 Esp. Rep. 143; 3 Id. 113.] But the proof of the fraud is full without it.

There is no error assigned, which enables the Court to revise the last decree, confirming the master's report, and perpetuating the injunction, and no exceptions were taken to the report. The only error complained of, is in the first decree, which did not dispose of the injunction. [3 Porter, 475]

ORMOND, J.—The object of the bill is, to obtain the title to sixty-two acres of land, part of a large tract purchased by the defendant in error, of Moore, which it is alledged, was fraudulently omitted, both in the memorandum of the sale, and in the deed subsequently executed.

It appears from the record, that Moore offered for sale, his tract of land, in Ashburn Cove, in Jackson county, including the lands purchased of the heirs of Daniel McDuff, containing about nine hundred and eighty acres. It is admitted by Moore, in his answer, that he had offered the land to Clay at some time previous to the consummation of the contract, and as appears from the testimony of Jordan, Clay, at the instance and by the request of Moore, to whom Jordan had been sent by Moore for that purpose, appointed a day for the examination of the land.

Clay accordingly went, accompanied by W. Brandon, but as it appears, having some distrust of Moore, did not ask him to show him the lands, but got Mr. Gurley, one of Moore's neighbors, who knew the land, to aid him in the examination. Gurley accordingly showed him all the land, including the sixty-two acres in dispute. The next morning the parties met at Gurley's house, and upon making an estimate, Clay remarked to Moore, that there was not as much land as he expected, to which Moore replied, "well, it is worth as much as I asked you for it," whereupon Clay agreed to take it, and the writings were executed, enumerating each particular piece, of which the entire tract was composed, but leaving out the sixty-two acres.

There can be no doubt whatever, that Clay supposed he was

purchasing the entire tract, which had been offered to him, and which he had examined, of which this sixty-two acres comprised a part. It is equally as certain, that Moore knew when the contract was made, that Clay was acting under a mistake, as to the sixty-two acres, and did not undeceive him. This appears, not only from the circumstances, attending the transaction, but explicitly from the proof, without considering the admission made by Moore, upon the proposed reference to arbitration. The evidence of Taylor, and Chambliss, proves that Moore knew of the mistake of Clay, and that he assigned as a reason for not undeceiving him, that Clay had distrusted him, and had procured others to aid him in the examination of the land, and considered the deception a good joke.

This conduct is wholly indefensible in morals, and the question is, whether in the estimation of a Court of Chancery, it is a fraud. Fraud in its broadest sense, consists in the assertion of a falsehood, or in the suppression of the truth. The latter branch of this definition, is much more difficult of application, than the first, from the narrow boundary, which frequently separates cases of conscience, from questions of law. Motives, which address themselves to the honor of the party, from those acts, and omissions which the law can redress.

This topic has frequently been under discussion in this Court. In Camp v. Camp, 2 Ala. Rep. 636, after an examination of this principle, it is said, "But the law is not so destitute of morality, as not to require each of the contracting parties to disclose to the other, all the material facts of which he has knowledge, and of which he knows the other to be ignorant, unless they are open to common observation; and not to forbid any intentional concealment, or suppression of the material facts necessary to be known, and to which the other party has not equal access, or means of ascertainment." So in Steele v. Kinkle & Lehr, 3 Ala. Rep. 357, it is said, a fraudulent concealment, is the failure to disclose a material fact, which the vendor knows himself, which he has a right to presume the person he is dealing with is ignorant of, and of the existence of which the other party cannot by ordinary diligence, become acquainted." Mr. Justice Story, in his work on Equity, 213, § 204, thus defines it—"The case must amount to the suppression of facts, which one party under the circumstances, is bound

in conscience and duty to disclose to the other party, and in respect to which, he cannot innocently be silent."

It is perfectly clear, that Moore was aware that Clay was ignorant of the fact, that in putting down the several parcels of which the tract was composed, he had left out the sixty-two acres. His attention was drawn to it, by the surprise expressed by Clay of the diminution in the quantity. This expression on the part of Clay, had reference to the previous conversation of the parties about the purchase of the land, and instead of informing him of the true state of the case, that his representation was correct, but that he, Clay, had omitted one of the parcels, he makes a remark, the direct tendency of which was to mislead, and throw him off his guard—that the land was, nevertheless, worth what he asked for it. The plain and evident meaning of which is, although I may have over estimated the number of acres in the tract, it is worth what I ask for it. Clay being of that opinion, and being willing to give the price asked for the land he had examined, concluded the bargain. It is important to consider, that this was not a sale by the acre, but at a gross price. The precise number of acres of which it consisted, was not therefore a matter of vital importance to be known.

This conduct on the part of Moore, appears to be the "industrious concealment," spoken of in the books—it was a resort to artifice to throw the other party off his guard, and prevent the true state of the case from being known, and approaches very near, if it is not in fact, the assertion of a falsehood. For the answer of Moore to Clay's remark, was intended to be understood, in a different sense from what was really the truth, as he knew at the time that the tract he was offering to sell, and Clay supposed he was buying, did contain nine hundred and eighty acres.

Again, in the deed which was made, after describing all the land except the sixty-two acres, the description continues, "and including the lands purchased by said Moore, of the heirs of Daniel McDuff," &c. This is a direct admission of the fact, which, in connection with the other proof, leaves the matter free from the possibility of doubt, that this particular tract was included as part of the land offered for sale.

That a Court of Equity can afford relief in such a case, when

the facts are fully and clearly made out, we think, cannot admit of serious doubt, at this day. The counsel for the plaintiff in error, supposes that relief can only be granted by enforcing the parol negotiations, which preceded the sale, and the consummation of the contract. They were, as he insists, negotiations merely, and therefore not binding on either. They are only referred to, as explanatory of the meaning and intentions of the parties, *as to the subject matter of the contract*, and not to explain, add to, or vary its terms, and the admission of such testimony has never been held, as violating either the rule of evidence, that a written instrument cannot be varied by parol, or the statute of frauds. [Ogilvie v. Foljambe, 3 Merivale, 52; Ellis v. Burden, 2 Ala. Rep. 463.]

Independent of this consideration, it is the established practice of Courts of Equity, to relieve against a written contract, where material stipulations have been added, or omitted, by mistake or fraud. This has always been considered an exception to the general rule, and is submitted to from the necessity of the case, to prevent a greater evil—the triumph of fraud, or the taking advantage of an innocent mistake. This point, was expressly thus ruled by this Court, in Minge v. Smith, 1 Ala. Rep. 415—that in a sale of lands, if either party has misrepresented, or made a fraudulent concealment as to quantity, the law will afford redress to the party aggrieved. See also Barnett v. Stanton & Pollard, 2 Id. 182; Cullum v. The Br. Bank at Mobile, 4 Ala. Rep. 21; Van Arsdale & Co. v. Howard, 5 Ala. Rep. 601; see also, 1 Story's Eq. 166, §§ 154, 155, and cases cited.

Having thus ascertained that the complainant is entitled to relief against Moore, we come to the consideration of the question, whether he is also entitled to relief against Freeman, who claims to be a purchaser of the land, without notice of the equity of Clay.

The doctrine upon this point is perfectly well understood, and free from all difficulty. A purchaser who buys land previously purchased by another, pays the purchase money, and obtains his title, before he receives notice of such prior purchase, will be protected against it. The plea, or answer, in which this defence is made, must aver these facts. Let us examine the answer of Freeman in this case. He admits, that

in the fall of 1834, he purchased from Moore a tract of land, consisting of two hundred and seventy-nine acres at the price of $2,599, payable in three annual instalments, the first falling due 1st January, 1835, all of which he has paid, and obtained a deed therefor from Moore. He admits, that the land in dispute was included in his purchase, but denies that he ever heard of the claim of the complainant, *before he made the purchase.* The deed from Moore to him, which is made an exhibit, is dated 1st February, 1836.

The allegations of this answer, considered under the statute as a plea, are wholly insufficient. The allegation that he did not have notice before he *made* the purchase, is of no avail, because, if he received notice before he *paid* the purchase money, it was sufficient. If he had paid a part of it, he should have proceeded no further with the contract, after receiving notice. It is insufficient, in not stating *when* he paid the purchase money. These important allegations are studiously avoided, nor indeed, is it stated with any thing like certainty, what price he was to give for this particular tract, or what proportion it bore, in *value*, to the entire tract purchased by him. If notice is not charged in the bill, it must nevertheless be denied in the plea, or answer—and it must be alledged that the vendor was, or pretended to be, seized in fee, and was in possession. [Boon v. Chiles, 10 Peters, 211; Story v. Lord Windsor, 2 Atk. 630; Duphey v. Frenaye, 5 Stew. & Por. 238; Sugden on Ven. 555.]

From this it appears, that the answer is entirely insufficient, admitting it to be true, to show that Freeman is a purchaser, for valuable consideration, without notice of the complainant's title. The complainant is entitled to the oath of the party seeking thus to protect himself, in addition to proof of the facts by competent testimony, and he must swear that he had not notice at the time of the purchase, and down to the time of the payment of the purchase money, and the execution of the deed. But in this case, the record shows that he was served with a *subpœna* and copy of the bill, before all the purchase money was due, and before he received a deed for the land. It is therefore unnecessary to consider, whether the evidence of Moore was properly rejected or not, as it could not have availed the defendant, Freeman, if it had been considered.

The proof is ample to show, that the sixty-two acres in controversy was assigned to Richard McDuff, as one of the heirs of Daniel McDuff, and that he sold it to Moore, and put him in possession, if the record of the Orphans' Court of Jackson county, by whose direction the division was made, is competent testimony. The case of Wyman v. Campbell, 6 Porter, 221, is a conclusive authority, that the record of the Orphans' Court cannot be impeached collaterally, for any irregularity, or informality in the proceedings, if the Court obtained jurisdiction, and rendered a final decree. The proceeding in this case was under the act of 1822, (Clay's Dig. 196, § 22.) Upon the petition of one of the heirs, the Court appointed commissioners to divide the real estate of Daniel McDuff, and ordered the return to be made, at a particular term of the Court. A survey and division of the land was made, and returned by them, and recorded by the clerk, and however irregular it may be, it cannot be impeached in this collateral way. The Court having acquired jurisdiction, and made its order or decree, the action of the commissioners, consequent thereon, is final, until reversed in a direct proceeding, having that for its object. The Court therefore did not err in divesting the title, which still remained in the heirs of Richard McDuff, and vesting it in the complainant.

It only remains to consider the final decree. There being no exception to the master's report, the only matter left open for the Chancellor, upon the final decree, was to make a proper disposition of the purchase money, still due from Clay to Moore, and the amount found by the report, to be due for the rent and profits of the land. It appears by the master's report, founded upon the testimony of Bradley, that all the purchase money has been paid by Clay, except $500. An objection has been raised to this evidence, because the bills and notes paid off were not produced, or their absence accounted for. This was not necessary, as was held by this Court in the P. and M. Bank v. Borland, 5 Ala. Rep. 543, and in other cases. This money belongs to Moore, and should have been decreed to him, but the Chancellor has decreed a perpetual injunction against its collection, probably considering that the amount due from Freeman for rent, being about the same amount, extinguished it. This, however, cannot be accomplished in this

mode, as the moneys are not due in the same right. The decree should have been in favor of Moore, against Clay, for the purchase money unpaid, and in favor of Clay, against Freeman for the rents and profits.

It is true, that a Court of Chancery will, when it has the power, decree as between the defendants, and settle the entire controversy in one suit. This is peculiarly a case of that kind. If Freeman has paid Moore, he should be allowed to extinguish the amount so paid in the hands of Clay. And this Court would so decree, if the record furnished the necessary *data*. But there is no evidence of the amount paid by Freeman to Moore, in any part of the record, for this particular piece of land. The testimony of Moore, which might be looked to for this purpose, does not state the amount, or when it was paid.

The decree of the Court must be therefore modified, so far as to render a decree in favor of Moore, for the purchase money unpaid, in all other respects it is affirmed. As the case has not been considered in the aspect last adverted to, by the Chancellor, the cause will be remanded, to enable either of the parties, if they think proper, upon a showing of the necessary facts, to move the Court to decree an extinguishment to the amount of the sum paid by Freeman to Moore, with interest.

From the peculiar condition of this cause, we do not think it equitable that either of the parties should be taxed with the entire costs of this Court, it must therefore be borne equally, by Moore, Freeman and Clay, the real parties litigant upon the record.

HUNTER v. WALDRON.

1. Where an overseer employed at a stipulated sum *per annum*, is sick a part of the year, so as to unfit him for active duty, but he is permitted to remain in the service of his employer up to the end of the year, he is entitled to a *pro rata*

compensation. If the defendant has been injured by the imperfect performance of the overseer's undertaking, the damages may be recouped, so as to compensate the injury.

2. Where the terms of a special unsealed agreement have been performed by the plaintiff, so that only a duty remains to pay the money, *indebitatus assumpsit* will lie. But where the contract is still open, or is to be performed in future, the count must be framed on the contract.

Writ of error to the Circuit Court of Dallas.

THE defendant in error declared against the plaintiff in *indebitatus assumpsit.* The cause was tried upon the pleas of non-assumpsit, payment, set off, failure of consideration, &c.; a verdict was returned for the plaintiff for the sum of five hundred and fifty-five 78-100 dollars; and judgment was rendered accordingly. On the trial, the defendant excepted to the ruling of the Court. From the bill of exceptions it appears, that the plaintiff was to attend to the business of the defendant, as an overseer upon his plantation, for the year 1842, for which the latter was to pay him five hundred dollars. *Further*, that the plaintiff was taken sick the last of August, or first of September, and continued dangerously ill for four weeks; towards the close of the year, he was sick two weeks more, but was feeble, and unable to attend to business, except to ride over the plantation, from the time he was first taken sick to the end of the year.

The defendant's counsel prayed the Court to charge the jury: 1. If they believed that there was a special contract, by which the plaintiff was to attend to the business of the defendant as overseer for the entire year, then he could not recover in this action, unless he had complied with the contract, although he might have been prevented by sickness. This charge was given, with this qualification, viz: if the plaintiff had performed services before he was taken sick, which were of value to the defendant, and accepted by him, then he might recover what those services were worth. 2. If they believed there was a contract between the plaintiff and defendant which was different from that declared on, then the plaintiff could not recover in this action upon the common counts only. This charge was also given, qualified as follows: if the term for which the plaintiff was employed had terminated, and he had rendered valuable services to the defendant, which the latter had accept-

ed, then the plaintiff could recover upon the common counts so much as his services were worth.

G. W. Gayle and T. J. Judge, for the plaintiff in error, insisted that the Circuit Judge should have given both the charges prayed by the defendant below, without any qualification, and cited Clements' adm'r v. Eslava, 4 Porter's Rep. 502; Greene v. Linton, et al. 7 Porter's Rep. 133; Gazzam v. Kirby, 8 Id. 253; Givhan v. Dailey's admr'x, 4 Ala. Rep. 336.

C. G. Edwards, for the defendant in error, contended that it might well be questioned whether the plaintiff below was not entitled to recover full wages for the entire year, without abatement for the time he was sick. But, be this as it may, there is no principle which will deny him the right to compensation for so much as his services were worth, proportioning their value by the sum agreed to be paid for the year.

COLLIER, C. J.—In Greene v. Linton, et al. 7 Porter's Rep. 133, the plaintiff stipulated that he would render service for the defendants for twelve months, alledged its performance for eight, and his sickness for four months; thus excusing a compliance *in toto*. But this Court said that the contract contained no implied condition that the plaintiff should continue in health each day of the entire year, and his right to compensation did not depend on any such contingency; and it would be unjust to the defendants to compel them to pay for the whole time, when the plaintiff had been incapacitated by disease during a great part of it. Gazzam v. Kirby, 8 Porter's Rep. 253, merely affirms the familiar principle, that if there is a special parol agreement for the performance of any duty, no action will lie until the duty has been actually performed. So Givhan v. Dailey's admr'x, 4 Ala. Rep. 336, is but the reiteration of the same principle, and declares, that when one agrees to serve another as an overseer for a year, and in consideration that he will do so, the employer agrees to pay a sum *in numero*, the performance of the entire service is a condition precedent to the right to recover wages; and if the overseer die during the year, his personal representative cannot recover a *pro rata* compensation for the period he served.

Neither, or all, the cases cited are decisive of the one now

before us; they all rest upon authority too long acquiesced in, and too often acknowledged to be now departed from. Here the plaintiff agreed to serve the defendant for a definite period, for which the latter undertook to pay a sum certain. Now to entitle the plaintiff to recover, he must show that he had substantially performed his part of the agreement. But he need not prove that his health was such, during the entire year as to enable him to devote all his time actively to his employer. Few men would be willing to agree to labor for any prescribed period, if disease of a days continuance should operate a forfeiture of the earnings of weeks or months. The mere mention of such a consequence, is quite enough to prove that it has no sanction in the law.

If an overseer is too sick to attend to his business, for so long a time that his employer's interest may suffer, or a substitute is necessary, the employer might furnish that substitute, and deduct from the overseer's wages a sufficient sum to compensate him. Or if his sickness is protracted, and promises to disable him for active service for a considerable length of time, perhaps the employer might put an end to their contract; but even then we apprehend that he would not be relieved from the payment of what would be a fair remuneration for the overseer's services, having in view the stipulated wages for the year.

In the present case it does not appear that defendant employed a substitute during the plaintiff's illness, or dismissed him from service, but the fair inference is, that the latter was recognized by the defendant as his overseer, up to the end of the year, and that his services in that character were accepted. This being the case, the defendant cannot claim an exemption from the payment of any compensation, upon the ground that the plaintiff was prevented by sickness from attending to his business for a part of the year. The fair mode of adjusting compensation in such case, is, to allow a deduction to the defendant for any loss he may have sustained in consequence of the plaintiff's illness, and pay him the remainder of the sum agreed for the year. This mode of adjustment results from the reasoning employed in Greene v. Linton, et al., and we think, rests upon indisputable principles.

The case of Givhan v. Dailey's admr'x is unlike that now

before us. There the death of the overseer prevented him from performing his contract. He stipulated for a year's service, and the terms of the agreement, made his performance a condition precedent to his right to wages; and under an unrelenting rule of law, too firmly established to be changed, save only by legislation, we were constrained to allow a defence which was seemingly ungracious.

In respect to the form of the declaration, we think it adapted to the evidence in the cause. The general rule may be thus stated, where the terms of a special unsealed agreement have been performed by the plaintiff, so that only a duty to pay the money remains, *indebitatus assumpsit* will lie. But where the contract is still open, or is to be performed in future, the count must be framed on the contract. See the cases collected in 1 Metc. & P. Dig. 275, §§ 184, 185; Sykes v. Summerel, 2 Browne's Rep. 225; Willington v. West Boyleston, 4 Pick. Rep. 101. We have seen that the plaintiff has so performed his contract as to entitle him to recover, and there can be no doubt that *indebitatus assumpsit* is the proper form of declaring. If the defendant has been injured by the imperfect performance, the damages may be recouped so as to compensate him therefor. The charges, with the qualifications objected to, so laid down the law in effect, and were quite as favorable as the defendant could have required.

The judgment of the Circuit Court is consequently affirmed.

MALLORY, ET AL. v. MATLOCK.

1. The refusal of a Court to permit a party to file interrogaties, and make an order for the adverse party to answer the same is not reversable by writ of error *Quere?*—Whether a mandamus is not the proper remedy, when a proper case is made.
2. A technical discontinuance by reason of the omission of the plaintiff to take a judgment of *nil dicit*, when a part of his debt is not answered by the plea filed, will not be enforced here.

3. When a demurrer has been improperly sustained, the error may be cured by withdrawing it and pleading to issue.
4. The omission to make profert of a sealed instrument is not, according to the course of practice, available on general demurrer.

Writ of error to the County Court of Benton.

Debt by Matlock against the Mallorys, on a writing obligatory, made by them, payable to him, on the 15th February, 1842, for $3,315. The declaration is in the usual form, except that it contains no profert of the writing obligatory. The defendants demurred, and their demurrer being overruled, they then pleaded as to $3,289 of the debt, that they paid the same on the 2d day of March, 1842, to one Hammond, who was the duly authorized agent of the plaintiff, to receive the sum so paid. The plaintiff first demurred to the plea, and the Court sustained the demurrer; afterwards he asked leave to withdraw his demurrer and rejoin to the plea, which the Court allowed him to do. Upon which the defendants excepted. The plaintiff then asked for a judgment, as to that part of his declaration not answered by the plea, and took issue upon it. The defendants refused to have any thing to do with the cause after the demurrer was sustained to their plea, except to make objections to any further proceedings in the cause.

The judgment entry recites the proceedings before stated with respect to the pleadings, and that the plaintiff asked a jury to try the issue joined, and also to assess the debt and damages in the plaintiff's declaration mentioned, not pleaded to. Whereupon came a jury, &c. who, being sworn to try the issue joined, and assess the debt and damages not controverted in that behalf, returned a verdict, finding the issue for the plaintiff and found the debt to be $3,300, and assessed the damages at $633 90, for which sums judgment was rendered.

At the first trial term the defendants filed certain interrogatories to be answered by the plaintiff, which it is unnecessary to state with more detail, as the opinion of the Court turns upon the invalidity of the exception. The Court refused to makes an order requiring the plaintiff to answer, upon which the defendants excepted. The trial was had at a subsequent term.

The defendants below now assign as error—

1. The refusal of the order for the plaintiff to answer the interrogatories filed.

2. That the Court should have entered a judgment, that the cause was discontinued after the demurrer to the plea.

3. In overruling the demurrer to the declaration.

4. In sustaining the demurrer to the plea.

5. In rendering the judgment shown in the record.

6. In not giving judgment for the defendants upon the whole record.

S. F. Rice, for the plaintiffs in error, made the following points:

1. The matter of the interrogatories was proper, and the order for their answer should have been made. [Goodwin v. Wood, 5 Ala. Rep. 152; Id. 731; Young v. McLemore, 3 Id. 295.]

2. By demurring to the plea, the plaintiff discontinued his action, as no judgment was taken for the part not answered by the plea. [Deshler v. Hodges, 3 Ala. Rep. 509; Steph. on Plead. 216; Comyn's Digest, Pleader E. 1, F. 4; 1 Saund. 28, note 3; Vincent v. Bester, 1 Lord. Raym. 716; Tippet v. May, 1 B. & P, 411; Markel v. Johnson, 1 Salk. 180]

3. After the discontinuance the cause could not properly be reinstated. [Leavitt v. Dawson, 4 Ala. Rep. 335; Givens v. Robbins, 5 Ib. 676; 6 Comyn's Dig. 271, Ev. 4; Steph. on P. 216.]

4. The plea is good, and upon the judgment upon the demurrer, the Court had no power to allow it to be withdrawn. [Clay's Dig. 334, § 119.]

5. As the judgment entry is, there is no judgment by *nil dicit*, for the part unanswered by the plea.

T. A. Walker, contra.

GOLDTHWAITE, J.—1. The refusal of the County Court to make the order asked for, at the instance of the defendants, to require the plaintiff to answer the interrogatories propounded by them, is not a matter which can be reversed by writ of error. It is not a matter entering into the final judgment of the Court, but is merely one mode, out of many, by which evidence is to be brought before the jury; and does not, to us,

seem to materially differ in its analogies, from the suing out of a commission to take the deposition of a witness. If the Court acts improperly in such a matter, it may possibly be subject to revision after the judgment is given, if the exception is properly taken, but if it refuses to act when a proper case is made out, it is quite likely that a *mandamus* would afford the appropriate remedy.

2. With respect to the supposed discontinuance arising out of the omission of the plaintiff to take judgment by *nil dicit*, for the portion of the debt unanswered by the plea, as well as the defect of form in the judgment entry we can only say, they belong to a class of exceptions which have never of late years, been recognized in this State, as affecting the validity of a recovery. The whole course of legislation, and of judicial decision in accordance with it, has been to divest our practice of technicalities, which, instead of advancing justice, tend greatly to bring the science of law into discredit. What injury has been done to these parties by the omission of the plaintiff to take a judgment in the manner it is contended he should have done? or why should the defendants complain, when every thing they asserted in defence of the action, has been found untrue by the verdict? The case of Deshler v. Hodges, 3 Ala. Rep. 509, affords no ground to the defendants, as no question as to the effect of a discontinuance was there decided, but what is said is a mere iteration of what is found in the books upon this subject.

3. In the present case the demurrer was withdrawn, and the error which there might otherwise have been in sustaining it, was thus corrected, and we entertain no doubt of the correctness of such a course of practice.

4. The objection to the omission of the profert of the writing obligatory in the declaration, is not seriously pressed, nor is it available on demurrer, under our practice. [Botts v. Bridges, 4 Porter, 274.]

We are unable to perceive any error in the record, and therefore the judgment of the County Court is affirmed.

POLLARD v. STANTON.

1. Although the perception of profits, as such, imposes on the person receiving them, all the obligations of a partner as to third persons, as between themselves they may by their own contract, regulate their respective liabilities in any manner they think proper; and may therefore stipulate, that one shall not be liable for the debts of the firm.

Error to the Circuit Court of Montgomery.

ASSUMPSIT by the plaintiff, against the defendant in error, for money paid, laid out, and expended.

Upon the trial, it appeared, that the plaintiff paid to the Planters and Merchants' Bank two notes of $12,180 62, each, signed by Charles Labuzan and Benjamin Stanton, Jr., as principals, and Charles Barny & Co., and the plaintiff, as sureties. There was evidence conducing to prove, that the plaintiff had been connected in mercantile business, as a partner, with the defendant in the following firms, viz: one, under the name of B. Stanton, Jr., in Mobile, which was afterwards merged in the firm of Labuzan & Stanton, in which they were both likewise partners; one in Montgomery under the style of Stanton, Pollard & Co., and one in Columbus, Mississippi, under the style of B. & W. Stanton. That there had been a dissolution of all the firms in the fall of 1836. There was some evidence conducing to show, a general and final settlement of all matters of partnership in all these concerns in July, 1838, by which Stanton fell in debt to Pollard, and other evidence tending to prove, that there were unsettled matters between them at a later period.

There was also in evidence an article of dissolution of copartnership between the plaintiff, defendant, and Labuzan, dated the 16th November, 1836, by which it was agreed between those constituting the firm of Labuzan & Stanton, that the house should be dissolved, and that Labuzan should con-

tinue the business in his own name. That Stanton should devote himself to the close of the business of Stanton & Pollard, and Labuzan & Stanton. That Pollard should close the business of Stanton, Pollard & Co., in Montgomery, and do all that he could to pay the balance due by that house to Labuzan & Stanton, and that he should draw all bills, which were necessary to assist in closing the business of S. P. & Co. in his own name, on Benj. Stanton, Jr. That for the sale of cotton shipped by Stanton, Pollard & Co., and D. & W. Stanton, commissions should be regularly charged, and that at the close of the season, an equal division of the profits should take place, made by Charles Labuzan; but if the profits did not amount to $3,500 each, that amount was to be secured to Labuzane, and the residue, if any, be divided between the other two. It being expressly understood, that the said Stanton & Pollard are not partners of Charles Labuzan, but that the share of the profits to be paid to the said Stanton & Pollard, is in consideration of their relinquishment of business in Mobile."

There was evidence conducing to show, that the notes paid by Pollard, for payment of which this action was brought, were the last of a series of extension notes, given under the act of 1837, and that the notes and bills consolidated in that settlement, were notes and bills, to which the parties were, C. Labuzan, Ben. Stanton, Jr., and D. & W. Stanton; the bill to which the latter firm was a party, being dated 9th February, 1837; and some evidence conducing to show, that said bills and notes were given to take up notes and bills, to which the old firm of Labuzan & Stanton, were parties, but that the names of Labuzan & Stanton no longer appeared on said notes and bills.

The plaintiff asked the Court to charge the jury, that the articles of dissolution of the firm of Labuzan & Stanton, to which both plaintiff and defendant were parties, estopped the defendant from setting up in this action—that plaintiff was a partner in the house styled C. Labuzan, and as such bound on paper signed after the date of said articles by Labuzan. This charge the Court refused, and charged, that said articles constituted a new copartnership, as to other persons, under the style of C. Labuzan, of which plaintiff and defendant were partners, and that the jury had in this action a right to consid-

er, whether, under said copartnership, plaintiff was not bound to the Planters & Merchants' Bank, on the notes signed by C. Labuzan, which were extended by the notes taken up by plaintiff.

The plaintiff further asked the Court to charge, that the taking up of papers signed by the old firm of Labuzan & Stanton, and substituting paper signed by C. Labuzan and B. Stanton, Jr., destroyed the indebtedness of Pollard, in his character of partner of the firm of Labuzan & Stanton. This charge the Court gave, with this qualification, that though plaintiff's indebtedness in that character was destroyed, yet that the articles of dissolution of that firm made him a partner as to third persons, in the house styled C. Labuzan, and that if the jury believed, that as a partner under these articles, or in any other way, he was bound to the Bank on the paper extended, so as to place him in a different attitude from an accommodation indorser, he was not entitled to recover in this action.

To the charges given and refused, the plaintiff excepted, and now assigns for error.

Hayne, for the plaintiff in error, contended, that it was entirely competent for partners, to stipulate, that one member of the firm should not be bound for its debts, and although this would not be binding on third persons, it would be between themselves. He cited Story on Partnership, § 1, 18, 20, 22, 23, 30, 32, 49, 63.

Harris, contra.

ORMOND, J.—Both the charges given by the Court, are based upon the assumption, that, because by the articles of dissolution of the old firms of B. Stanton, Jr., Labuzan & Stanton, Stanton, Pollard & Co. and B. & W. Stanton, and the establishment of the new house in Mobile, of Charles Labuzan, it was stipulated, that Pollard & Stanton, should receive a portion of the profits of the business of Charles Labuzan, they thereby become partners of the new house of Charles Labuzan, as to third persons. This may be conceded, and yet it does not necessarily follow, that they are partners as between each other. Although they could not stipulate that one who was to receive a portion of the profits, should not be res-

ponsible to the creditors of the firm for its debts, yet, it was entirely competent for them to agree, that as between each other, the common incidents of a partnership should not follow; and this they have explicitly done in the closing article, in which it is stated, "that they should not be *partners* of Charles Labuzan."

No principle of the law of partnership is better established, than this, that whilst the perception of profits, as such, imposes on the person receiving them, all the obligations of a partner as to third persons, as between each other, they may by their own contract, regulate their respective liabilities, in any manner they think proper. [Gow. on Part. 13, and cases cited; Hesketh v. Blanchard, 4 East, 144; Winship v. The Bank of the United States, 5 Peters, 530.]

This proposition is directly denied by the Court, in both of its charges to the jury, and the jury are in effect told, that because the Planters and Merchants' Bank could have recovered from the plaintiff as a partner of Charles Labuzan, that therefore the plaintiff cannot recover from Labuzan, although he paid the debt as the surety of the house of Charles Labuzan. Now there can be no doubt, that partners may stipulate between each other, that one shall receive a portion of the profits, and shall not be bound for the debts, or losses of the firm, and that as between themselves such a stipulation will be binding; such in effect was the engagement in this case.

No question is made upon the record, as to the liability of the plaintiff, for the debts of the old firms, as the Court conceded, that by the substitution of the paper of C. Labuzan and B. Stanton, for that of the old firms, the liability of Pollard as partner was destroyed; nor does the record furnish us with the means of determining, whether any such liability continues, or not, and we therefore express no opinion upon it.

Let the judgment be reversed, and the cause remanded.

PLANTERS AND MERCHANTS' BANK OF MOBILE v. CLARKE.

1. A deed conveying a plantation, &c., to trustees, for the benefit of certain creditors of the grantor, is not void merely because it provides that the trustees may, *if they think proper*, permit the grantor to reside upon the plantation, and have the management thereof, under the supervision of the trustees, until the growing crop is sold.
2. A deed conveyed in trust all the estate of a debtor, consisting of "lands, slaves, carriage, wagon, cart, mules, horses, hogs, cattle, all plantation and farming utensils, with the crop of corn, cotton and grain, growing on the plantation;" and provided that the property thus conveyed should not be sold, until the estate of the sureties and indorsers intended to be secured, were levied on by executions on judgments obtained against them: *Held*, that the deed was not obnoxious to the objection of being made to "delay, hinder or defraud creditors."

Writ of error to the Circuit Court of Marengo.

A WRIT of *fieri facias* at the suit of the plaintiff in error, was issued from the Circuit Court of Mobile, on the 8th of June, 1843, requiring the sum of four thousand, two hundred and twenty-four 94-100 dollars, with ten 18-100 dollars costs, to be made of the goods and chattels of Robert Clarke and Thomas Clarke. This *fi. fa.* was placed in the hands of the sheriff of Marengo, on the 13th of the same month, and on the 20th, was levied on sundry slaves, (whose names are distinctly stated,) as the property of Robert Clarke. The defendant in error interposed a claim to all of the slaves, and entered into bond with sureties for the prosecution thereof, pursuant to the statute. An issue being made up for the trial of the right and submitted to a jury, a verdict was returned in favor of the claimant, and judgment rendered accordingly.

On the trial a bill of exceptions was sealed at the instance of the plaintiff in execution, from which it appears among other things, that the claimant offered to read to the jury a deed of trust dated the 20th day of May, 1843, between Robert Clarke of the first part, Wm. E. Clarke of the second part, and Richard

Clarke, of the county of Perry, Leland Trippe, Thomas J. McFarland, Elam Lockhart, Wm. C. Trokes, of the county of Marengo, Alabama, and Wm. Clarke of the county of Dinwiddie, in the State of Virginia. This deed recites, that Richard Clarke, Trippe, Lockett, McFarland and Trokes, had become liable at different times as sureties of the grantor, for the payment of certain notes; that McFarland was also bound as his surety in certain bonds for writs of error; and that some of the beneficiaries in the deed were liable as the indorsers and acceptors in certain bills of exchange, particularly described. To secure the several persons named from any loss or damage in consequence of their liability, and to secure the payment of debts due to some of them as creditors, the grantor conveyed to the party of the second part all his estate, consisting of lands, slaves, carriage, wagon, cart, mules, horses, hogs, cattle, all household and kitchen furniture, all plantation and farming utensils, with the crop of corn, cotton and grain then growing on his plantation.

It is provided by the deed, that "the party of the second part shall take into his possession the property conveyed, and the rents, issues, and profits thereof, until the sale of the same as hereinafter provided, or performance of the condition of the said party of the first part as shall be hereafter set forth. The said party of the second part shall, if he think proper so to do, permit the said party of the first part to reside upon said plantation, and to have the management, (under his supervision however,) of the crop growing thereon, until a sale of the same as hereinafter provided." *It is further provided*, that the trustee shall receive the proceeds of the growing crop of cotton and apply the same as follows, viz: 1. To the payment of all judgments, executions and debts of the grantor, for which McFarland is his surety. 2. To the payment of the debt due to John S. Butler, as the grantor's overseer. 3. To the payment of the debt due Graham and Chambers, for which Richard Clarke is the surety. 4. To the payment of the bill of which Trippe is acceptor, and indorsed by Clarke, Lockhart and Trokes; and 5thly, to the payment of the debt due to Wm. Clarke.

Should an execution be levied on McFarland's property in a case in which he is bound for the grantor, then the trustee

on his application was authorized to sell enough of the property conveyed to pay the same. The trustee was to pay the necessary expenses of conducting the plantation out of the proceeds of the crop to be growed thereon. It is provided that if the grantor should pay the debts, &c., the deed should be void, without appointing a time within which they shall be paid.

The deed concludes with the following provision, "It is further stipulated and agreed that the meaning and intention of the clause herein, in which it is said, that the said party of the second part shall sell the property hereby conveyed on the application of either of the parties of the party of the third part, is, that such application shall not be made until executions founded on suits instituted on the instruments on which said parties have become securities as aforesaid, shall be levied on the property of the said parties, or either of them; and then after such application it shall be the duty of the said party of the second part to sell as before directed."

The execution of the deed was acknowledged shortly after its execution, and duly registered on the 1st June, 1843.

The plaintiff objected to the introduction of the deed as evidence, upon the ground that it disclosed upon its face evidence of an intention to delay, hinder or defraud the creditors of the grantor, and was therefore void; but the objection, was overruled, and the deed permitted to go to the jury. It was shown by the plaintiff, that Robert Clarke was in possession of the property in question at the time the levy was made, and what was its value, &c. The claimant adduced testimony tending to show that the debts intended to be provided for by the deed, were correct; and that upon the execution of the deed of trust, the property in controversy went into the possession of the trustee, and by the latter was returned to the possession of the grantor as his agent, with whom the possession has since remained. The plaintiff prayed the Court to charge the jury, that the deed of trust in question contained evidence upon its face of an intention on the part of the grantor, to hinder and delay his creditors, and is therefore void in law; which instruction the Court refused, and charged the jury, that if they believed from all the testimony the deed was made in good faith, and to secure honest and *bona fide* debts, their verdict ought to be for the claimant.

F. S. Lyon, for the plaintiff in error, made the following points: 1. The deed upon its face reserves a benefit to the grantor, in providing that he may retain possession, and for the payment of the expenses of conducting the plantation while he retained the possession; and is therefore void. [1 Stew. & P. Rep. 139.]

2. The deed is void because it conveys property which must necessarily be consumed in the use, such as corn, grain, &c.; and contains such provisions as secured the possession to the grantor for a longer period than was necessary to mature the growing crop—a possession until the notes and bills were sued to judgment, and executions levied upon the estate of the sureties and indorsers. [4 Yerger's Rep. 541; 5 Ala. Rep. 297.]

3. The deed is also obnoxious to the objection of being intended to hinder and delay creditors, in providing that the trustee should not sell until the property of the sureties or indorsers were levied on; and in also providing that it should be void if the grantor thought proper to pay the debts before suits, &c.

Manning, for the defendant in error, insisted that fraud was a question of intention, and generally the facts must be ascertained by the verdict of a jury. It was however admitted that if a deed carry on its face irresistible evidence of fraud, the Court may pronounce it fraudulent. [1 Stew. Rep. 79; 1 Spear's Rep. 203-4.]

The deed in the present case is free from any intrinsic objection. 1. It gives the entire control of the property conveyed to the trustee, and the clause which declares that he may, *if he thinks proper*, and under his supervision, permit the grantor to manage the plantation, confers no benefit on the latter, or power on the trustee, which he would not have possessed if it had been entirely omitted. The grantor did not stipulate for any compensation, and it cannot be intended, from the insertion of the clause, that he supposed his management would be more advantageous. 2. The fair inference from the deed is, that the property should be kept together unsold, until the crop of cotton growing on the land when it was executed, should be gathered and sold, (5 Ala. Rep. 303;) unless it should be necessary to sell sooner, to save the parties of the third part from

loss. But after that time, under all circumstances, a sale should be made by the trustee, if the grantor failed to pay the debts. 3. It is provided that if a part of the property be sold, to pay part of the debts, and a surplus of the proceeds remain in the trustee's hands, instead of paying it to the grantor, it shall be applied to discharge the other liabilities provided for by the deed. 4. The last provision means nothing more than, that the sureties shall not have the grantor's property levied on, until they shall have paid, or be in danger of sustaining damage by reason of a levy on their property for the grantor's debt. In this respect the deed is not prejudicial to the parties of the third part, but gives a sure and speedy remedy by a sale of the property conveyed, without in any manner interfering with the right of the creditor to sue.

Taken as a whole, there is nothing on the face of the deed, to induce the belief that it was not executed in the most perfect good faith; and if it is suspicious, it was competent to sustain it by proof.

The grantor passed from himself all the property embraced by the deed, and provided that it should not revest in him until all the debts, &c. were paid. In this there is no perceivable intention to delay, or hinder the creditors of the grantor in the collection of their debts; but rather to make all the grantor's property liable for his debts, and ultimately to devote it to their payment.

An instrument is to be construed *ut res magis valeat, quam pereat.* Courts of equity have considered a power limited in terms, a general power, where such construction has been necessary to carry out the intention. [1 Johns. Ch. Rep. 129; 7 Id. 33, *et post.*]

COLLIER, C. J.—1. In Richards v. Hazzard, 1 Stew. & P. Rep. 139, the deed assigned all the property of the debtor to a third person, in trust for certain creditors, reserving to the grantor the sum of two thousand dollars *per annum*, for the support of himself and family, during the continuance of the trust. There was then a provision appropriating the residue of the debtor's estate to the payment of his creditors generally. The Court said, "That by reason of the reservation contained in the deed, it must be considered fraudulent and void, as against

the sound policy of the law, and against the statute of frauds, being obviously made with intent to delay, hinder or defraud creditors of their just and legal actions."

In the case before us, the deed does not stipulate for a benefit to the grantor. It expressly provides that the trustee shall take possession of and hold the property conveyed, and the profits, &c., until the sale thereof, or until the grantor shall pay the debts intended to be provided for, or counter-secured. It is not absolutely agreed that the grantor shall have the possession or control of the property, but merely that the trustee, if he think proper, shall permit him to reside upon the plantation and have the management thereof, under the trustee's supervision, until the growing crop shall be sold. Here it must be observed is no stipulation binding upon the trustee, but leaves it to his discretion whether he will permit the grantor to reside upon the plantation and manage the crop in subordination to his authority. If the deed had been silent upon this point, it would doubtless have been competent for the trustee to have employed the grantor as his agent in guiding the operations of the farm, or in performing some other duty incident to the trust, without affecting in any manner the validity of the deed, or the security which it afforded to the *cestuis que trust.* Can then, a provision, which possesses no potency in itself, and which cannot, in the slightest degree, change the operation of the deed, stamp it with the impress of fraud, or impair its legal efficacy?

The deed was executed after the crop for the year must have been planted, and it might have been for the interest of the beneficiaries that the grantor should have been permitted to continue his residence upon the plantation, and direct the operations there; especially if he asked no remuneration for his services. In Ashurst v. Martin, 9 Porter, 566, the deed purported to be a conveyance of the estate of the debtor, in trust to pay creditors, and contained, among others, a stipulation that the trustee should not be responsible for the acts of his agents, nor be charged for any moneys except such as should be actually received by him. It was held that this provision did not make the trustee irresponsible for any agent that might be selected by him, but only for such as were "necessary to enable him to execute the trust, selected in good faith,

with a due regard to their fitness, and a proper supervision exercised over them." This being the case, the appointment of even the debtor himself would not defeat the trust estate, and consequent right of preferred creditors. The same result would follow, although the agency might be a source of profit; for if the deed does not, (as we have seen,) secure it to the grantor, no *post factum* act, in which the beneficiaries did not participate, though under some circumstances it might be construed a fraud, would divest their rights.

2. The deed does not convey the corn and other provisions, which the grantor had in store at the time it was executed, but the crop of corn, &c. then growing; but if it did, it could not affect its validity. In Ravisies v. Alston, 5 Ala. Rep. 297, the deed conveyed lands, slaves, mules, horses, plantation utensils, &c. with the right to sell and dispose of the crop to be grown during the current year, to pay the debts secured. We said, "The corn, fodder, bacon, &c. were necessary to provision the plantation, and to the making of the crop, for which purpose, and not for the use of the grantor, they are reserved in the deed. These articles, though destroyed by the use, during the year, would not be converted into money, but would be reproduced by the cultivation of the plantation. How far it might be allowable to extend assignments of this character, or whether they could continue beyond a single crop, it is not necessary now to determine, but within that limit, and with the power given by statute to every creditor to pay the debt secured by the deed, and substitute himself to the condition of the preferred creditor, it does not appear to be liable to abuse." The case cited from 4th Yerger is noticed in Ravisies v. Alston, and shown to be distinguishable from it.

In respect to the growing crop of corn, &c., it may be remarked, that, when gathered, it was not necessarily to be consumed on the plantation, but when the state of things existed which authorized the beneficiaries in the deed, or any one of them to demand a sale, it was within the power and discretion of the trustee to sell the corn, &c., instead of other property, where a sale of all was not necessary. And if no sale was demanded, so that it was proper to keep the slaves, &c., on the plantation, humanity and law require that they should be fed; in fact their labor could not be profitable unless their wants

were supplied; under such circumstances we can conceive of no objection in thus appropriating the provisions grown on the farm. The imputation of fraud founded on this ground, is gratuitous, when it is recollected that what is consumed is necessary to the subsistence of the slaves, mules, &c., and is paid for, not only by the reproduction of other provisions, but of something else for market.

The possession and employment of the property by the trustee, was not under the deed, necessarily to continue longer than the then current year. The provision, in respect to a sale, might or might not be executed sooner, depending to a great extent, upon the promptness with which the creditors of the grantor, whose demands are mentioned in the deed, might attempt to enforce them.

3. In providing that the estate of the grantor shall not be sold, until the property of his sureties and indorsers were levied on by executions on judgments obtained against them, the deed is not obnoxious to the objection of being made to "delay, hinder or defraud creditors," in the legal sense of those terms. This conclusion is the clear result of previous adjudications, with which we are well satisfied; among which are Tarver v. Roffe, and Dubose v. Dubose, at this term.

The judgment of the Circuit Court is consequently affirmed.

THE WETUMPKA AND COOSA RAIL ROAD COMPANY v. HILL & LOCKETT.

1. When articles of agreement under seal purport to be between the defendants of the first part, and the plaintiff of the second part, the non execution of the instrument by the plaintiff, will not prevent the defendants from being held liable.
2. Debt is a proper form of action on an instrument, under seal, whenever a pecuniary demand, which can readily be reduced to a certainty, is sought to be recovered.

Writ of error to the Circuit Court of Autauga.

DEBT on a sealed instrument, by Hill and Lockett, against the Rail Road Company.

The declaration complains of the defendant, that it render to the plaintiffs the sum of ten thousand dollars, which it owes to, and unjustly detains from them. The instrument is set out in the declaration, and is to the following effect: It purports to be an agreement entered into by the company, of the first part, and the plaintiffs, of the second part, but is sealed only by the former. By it the party of the second part is said to contract, to execute the clearing, grubbing, and grading upon that part of the line of the Rail Road, between stations 368 1-2 and 475, left unfinished by the forces of the company of Messrs. Child, Hill & Co., or such portion as the plaintiff should be able to complete by the 1st day of January, 1840, at the following prices, to wit: for clearing and grading, at the rate of 300 dollars per mile. For excavation and embankment, at the rate of 23 cents per cubic yard. For hard firm, rock, or any other substance harder than common clay, at the prices usually paid, or as may be agreed on between the engineer of the company and the parties of the second part. The whole work to be executed in accordance with the instructions of the engineer.

The plaintiffs then aver, that in accordance with the stipulations of the said agreement, they executed 6,376 24-100 cubic yards of excavation, which at 23 cents per cubic yard, amounted to 1,466 53-100 dollars. Also, 6,406 80-100 cubic yards of embankment, which, at 23 cents per cubic yard, amounted to 1,473 56-100 dollars. Also 6,100 feet of clearing and grubbing, which, at 300 dollars per mile, amounted to 346 59-100 dollars; which respective sums amount to 3,286 86-100 dollars, exclusive of interest which has accrued. It then avers notice to the defendant, of the premises, and concludes, that by reason of the said sum of 3,286 86-100 dollars remaining due and unpaid, an action hath accrued to the plaintiffs to have the said sum of, and from, the said defendant, which it neglects and refuses to pay to their, damage of 10,000 dollars.

The defendants demurred to this declaration, and its demurrer having been overruled, the judgment upon it is now assigned as error.

Pryor, for the plaintiff in error, made two points—

1. That the instrument sued on is incomplete, and was never executed by the plaintiffs.

2. Debt will not lie on such a contract, covenant is the only proper remedy. [1 Chitty, 114; Platt on Con. 545; Fontaine v. Aresta, 2 McLean, 127; McKenzie v. Connor, 1 Stewart, 162.]

S. P. Storrs, contra, insisted, that the action was well brought, debt being the appropriate remedy, when the sum to be recovered is certain, or can be made so by acts done under the agreement of the parties. [2 Stephen's Nisi Prius, 1058, 1179; 2 Lord Raymd. 814; Walker v. Witter, 1 Douglass, 6; U. States v. Colt, 1 Peters C. C. 146.]

GOLDTHWAITE, J.—1. Neither of the grounds assumed against the declaration are considered by us as being available. It is not essential to the plaintiff's right to recover, that they should have become bound by the same instrument, or in the same manner as the company was bound to them. The right to compensation from the company, does not depend upon the question, whether the plaintiffs were bound; payment under the contract could only be called for upon the performance of the work; and this payment the company covenanted to make, by the instrument set out in the declaration.

2. The point principally relied on, however, is, that covenant, and not debt, is the appropriate form of action, to enforce this contract. Covenant is said to be the *peculiar* remedy for the performance of a contract under seal, when the damages are unliquidated, and depend in amount, on the opinion of a jury. [Chitty Plead. 116.] Debt, it is said, is not in any case sustainable, unless the demand be for a sum certain, or for a pecuniary demand, which can readily be reduced to a certainty. [Ib. 110.]

Here the damages arising out of the non payment of what has been earned, cannot be said to be unliquidated; the agreement of the parties provides a specific mode and rule of payment, which is ascertained as soon as it is known what work was done. It is therefore, a pecuniary demand, which can readily be reduced to a certainty. Indeed, it is every way

more certain than a charter party of affreightment, or a policy of insurance, upon either of which, it is said debt will lie. [Ib. 107.]

There seems to be no error in this form of declaring.

Judgment affirmed.

PLOWMAN & McLANE v. RIDDLE.

1. A promise to pay a sum of money, at a specified time, "which may be discharged in good leather," at a specified price, is a conditional contract, but becomes absolute, if the payee does not give notice of his intention to pay in leather.
2. One partner when sued jointly with another, has the right to plead separately: therefore, when one of the partners pleaded non-assumpsit, and the plaintiff replied, that he in connection with his partner did assume, &c., to which he rejoined, that he did not assume in manner, &c., as the plaintiff in his declaration, and in his replication had alledged, to which the plaintiff demurred, and the Court sustained the demurrer: *Held*, that this was in effect an issue upon the plea of non-assumpsit, and the demurrer improperly sustained.

Error to the County Court of Talladega.

Assumpsit by the defendant, against the plaintiffs in error. The plaintiff declared on a promissory note for three hundred dollars.

McLane appeared, and pleaded *non assumpsit*, failure of consideration, want of consideration, payment, set off, and a special plea, that by the note it was provided, that it might be discharged in good leather, one third in sole leather, at thirty cents per pound, one third in skirting and harness leather, at thirty-seven and a half cents per pound, and the other third in upper leather, priced in proportion to the sole and harness leather, and averred, that at the maturity of the note, he and the said Plowman were ready at their tan yard, and had a sufficient quantity of the kinds of leather mentioned in the note,

to have discharged it according to its terms; and have ever since had at their tan yard, a sufficient quantity of the kinds of leather mentioned in the note, to have discharged it according to its terms, and that he was, at the maturity of the note, and has ever since been, ready and willing to discharge the note according to its terms.

The plaintiff took issue upon the second, third, fourth and fifth pleas. To the first, he replied, that Plowman & McLane did assume, in manner and form as in the declaration is alledged, and this he is ready to verify.

To this replication, the defendant, McLane, rejoined, that he did not assume, in manner and form as the plaintiff in his declaration, and in his replication, had alledged, &c.

The plaintiff demurred to this rejoinder, and also to the sixth plea, which were both sustained by the Court.

Upon the trial upon the issues, the plaintiff read his note, as follows: "On or before the 25th December, 1843, we promise to pay Alexander Riddle, or bearer, the sum of three hundred dollars, which may be discharged in good leather, one-third in sole leather, at thirty cents per pound, one third in harness or skirting leather, at thirty-seven and a half cents per pound, and the other third in upper leather, price in proportion to the sole and harness leather—value rec'd, this 18th Feb'ry, 1842.

PLOWMAN & MCLANE."

The defendant proved a dissolution in the summer of 1843, and a notice of such dissolution to the plaintiff, and by a witness offered to prove all the facts alledged in the sixth plea, but on the plaintiff's motion, the Court excluded the testimony, and the defendant excepted. After the opening argument, and whilst the defendant's counsel was speaking, the Court permitted the plaintiff to take a judgment by default against Plowman, to which the defendant objected, and moved the Court for a discontinuance, which was overruled, and to which the defendant excepted.

These matters are separately assigned for error by both defendants.

RICE, for plaintiff in error, argued that the action was discontinued, and cited 1 B. & P. 411. That if the judgment had been taken by default, in proper time, Plowman would have

been a competent witness for his co-defendant. [5 Ala. Rep. 694.]

By sustaining the demurrer to the defendant's rejoinder upon the first plea, the Court denied to McLane, the right to plead for himself separately. [8th Porter, 523.]

The sixth plea should have been sustained. The acts to be done by both parties were mutual, and neither can recover without averring a readiness and willingness to perform the contract on his part. [1 Chitty P. 358; 1 Stew. 524; 2 Id. 444; 6 Ala. 324; 8 Term, 366; 1 Peters, 455.]

L. E. Parsons, contra.

ORMOND, J.—The last plea sets up as defence to the action, a condition of the contract, that the sum of money for which it was made, "may be discharged in good leather; one third in sole leather, at thirty cents per pound, one third in harness or skirting leather, at thirty-seven and a half cents per pound, and the residue in upper leather priced in the same proportion," and averred a readiness and willingness to deliver the leather, at the maturity of the note.

In the case of McMurray v. The State, 6 Ala. Rep. 324, this Court considered, at some length, the law arising upon contracts to deliver ponderous articles, and it was held, that upon a contract to deliver plank upon a day certain, it would be a defence to the action, if the defendant was ready, and willing, to deliver at the time agreed upon in the contract. See also Thaxton v. Edwards, 1 Stewart, 524.

The defendant appears to have considered this contract, as in legal effect, a promise to deliver leather of the kinds specified, to the value of three hundred dollars, at a particular time; but that is clearly not the contract of the parties, which is to pay three hundred dollars, at a particular time, with a condition superadded, giving them the privilege of discharging it in leather, at a specified price. This is clearly for their benefit, and it was their duty, if they elected to deliver the leather in discharge of their contract, to give notice to the plaintiff of their readiness and willingness to do so. Having omitted to do so, their contract to pay the money has become absolute, and they cannot, when sued for the money, defeat the action by

proving the existence of a fact, which was peculiarly within their own knowledge.

The injustice of this defence will be apparent, when it is considered that the defendants were under no obligation to deliver the leather, and if it had risen in price, doubtless would not have delivered it, but would have paid the money; being then a condition inserted for their benefit, it was necessary that they should have given notice of their election to pay in leather. [McRae v. Raser, 9 Porter, 122; Stewart v. Donnelly, 4 Yerger, 177; Church v. Feteran, 2 Penn. 301; Erwin v. Cook, 2 Dev. 183.] From this examination, it appears that the plea was bad, in not averring notice of an election to discharge the obligation in leather.

The defendant, McLane, had the undoubted right to plead separately, and having pleaded the general issue, the plaintiff replied to it, that he did promise and assume, in connection with Plowman, his then partner. To this the defendant rejoined, that he did not assume, &c., reiterating his first plea, to which there was a demurrer, which the Court sustained. In this the Court undoubtedly erred. He had the clear right to plead separately, as was held by this Court in Beal v. Snedicor, 8 Porter, 523. We do not indeed perceive that the rejoinder was necessary, inasmuch as the replication controverted the allegation of the plea, and added another immaterial fact, which, as it went to the form only of the pleading, might, under our statute abolishing general demurrers, be rejected as surplusage. The informal replication, however, superinduced the supposed necessity for the rejoinder, which was, in effect, merely taking issue on the replication, and by the decision of the Court upon the plaintiff's demurrer, the defendant was effectually cut off from the benefit of his plea. For this error the judgment must be reversed and the cause remanded.

LITCHFIELD, USE, &c. v. ALLEN & FALCONER.

1. The provision of the act of 1828, which requires the consent of the indorser, in order to excuse the failure of the indorsee to sue the maker or obligor within the time prescribed, to be given in writing, applies only where the amount in controversy does not exceed fifty dollars; in other cases a verbal consent is binding on the indorser.
2. Where, upon the sale of property, the vendor receives a note with an indorsement for a greater amount than the purchase money, and gives his own note to the vendee for the payment of the excess at a day certain, the vendor when sued upon his note, may show in defence to the action that the maker of the indorsed note was insolvent, so that a suit against him would have been unavailing; and this although no action was brought. The insolvency of the maker may be shown by parol evidence—the statute requiring suit to be brought to the first term, &c., only applies when an action is brought by the indorsee against the indorser upon his indorsement.
3. Where the vendor of property receives from the vendee a promissory note (indorsed by the latter) for an amount larger than the purchase money, and gives his own note payable at a day certain for the excess, to entitle the vendor to insist upon the want of consideration when sued on his note, it is not necessary, that he should release the vendee from his indorsement to a corresponding extent; if the defence is successful the plaintiff may claim a deduction from his liability as indorser. Nor will the pendency of a suit, by the vendor (as indorsee) against his indorser, in any manner prejudice the defence; such an action may be maintained to recover the price of the property sold.

Writ of error to the Circuit Court of Greene.

This was an action of debt on a bill single, by which the defendants in error on the 7th February, 1836, promised to pay to the plaintiff six hundred and seventeen 50-100 dollars, on the first of January thereafter. The cause was tried on the pleas of want of consideration, and failure of consideration. The plaintiff excepted to the ruling of the Court; and from the bill of exceptions the case may be thus stated. About the first of the year 1836, the defendant, Allen, sold to the plaintiff, a negro man for $800, and received in payment, a note made by Willis A. Arrington, and Anthony S. Arrington, with

the plaintiff's indorsement, for twelve or thirteen hundred dollars, of which James R. Battle was the payee. Allen executed the specialty declared on, for the payment of the difference between the note of the Arringtons and the price of the negro, and the defendant, Falconer, is a mere surety.

The defendants introduced the transcript of the record of a suit, judgment and execution from the County Court of Sumter, in the name of James R. Battle for the use of Allen, against the Arringtons, on their promissory note, for the payment to Battle, on the 1st January, 1837, of the sum of $1,230. The date of the writ showed, that the action was commenced 26th May, 1837, returnable to July term, 1837; judgment was rendered in July, 1838, for $1,379 77-100, besides costs; execution issued 28th July, 1838, and was returned "no property found, 10th September, 1838." It was further proved, that the plaintiff admitted, he consented, that suit against the Arringtons should be delayed, until he should see them, and communicate the result of the interview to Allen: such consent was not shown to have been in writing.

The plaintiff then introduced the transcript of a record from the Circuit Court of Sumter, which showed, that Allen, on the 22d September, 1838, commenced a suit against the plaintiff, upon his indorsement of a note made by the Arringtons for the payment of $1,230 to Battle, on the 1st January, 1837. This suit was still pending.

The Court instructed the jury, that if the note of the Arringtons was regularly indorsed, by Battle as well as the plaintiff, Allen was bound to sue the makers to the first Court after he acquired it; that a verbal contract by the plaintiff, would not excuse the delay, and that the return of no "property found" to an execution, when the suit was brought to a term subsequent, would not show the failure of the consideration of the specialty on which this action was founded. *Further*, if the note of the Arringtons was indorsed by the plaintiff only, then a verbal consent by him to delay suit thereon would excuse the failure of Allen to sue to the first Court; and if he afterwards prosecuted a suit to judgment, execution, and return of "no property found," then the consideration of the specialty had failed; but it devolved upon the defendant to show that the note was not indorsed by the payee.

The plaintiff prayed the Court to charge the jury, that the transcript of the record introduced by the defendant was no evidence that the note of the Arringtons was not indorsed by Battle; but the Court refused the instruction, and charged that they might look to it, and the manner of bringing the suit as a circumstance, though it was not conclusive. The plaintiff further prayed the Court to instruct the jury, that to entitle the defendants to insist upon a failure of consideration by reason of Arringtons' insolvency, they must show that Allen had discharged the plaintiff *pro tanto* from his liability as indorser upon the note of the Arringtons; also that Allen had placed what would be the plaintiff's share of the judgment against the Arringtons under the plaintiff's control, or had offered to do so. Which charges were refused.

The jury returned a verdict for the defendant, and judgment was rendered accordingly.

Reavis, for the plaintiff in error, made the following points: 1. The charge in respect to the failure of consideration is opposed to the decision of this Court when the present case was here at a previous term. [2 Ala. Rep. 280.] 2 If Allen is prosecuting a suit against the plaintiff on his indorsement as proved, he cannot set up a failure of the consideration of the writing declared on, for the indorsement of which it was given. 3. The transcript of the record adduced by the defendants was not evidence, to show that that the note of the Arringtons had been indorsed by Battle. The note itself should have been produced.

Pierce, for the defendants. The consent of the indorser, that the indorsee need not sue the makers of the note to the first Court, may have been verbally given; the statute which requires a written consent relates to suits to be brought before justices of the peace.

In admitting the transcript of the record adduced by the defendant in the qualified manner in which it was allowed to go to the jury, there was no error. It was certainly evidence to show who were parties to that suit, what the form of the note, &c.

It was not necessary to show that Litchfield had been discharged from liability as the indorser of the Arringtons' note,

or that his share of the judgment against them had been placed under his control. The insolvency of the Arringtons being shown by the record, and the consent of the plaintiff not to sue them to the first Court, proved, the defence was fully made out.

The indorsement of the Arringtons' note, if nothing can be recovered on it, as the return on the execution indicates, is not such a consideration as will make the defendants liable in the present case. If the plaintiff fails to recover, he will not be prejudiced; but may show that the consideration he received for his indorsement was the price of the negro, and thus limit the recovery against him. If the judgment against the Arringtons should ever be made available, the plaintiff may claim his portion of it.

COLLIER, C. J.—When this cause was here several years ago, we said, that "the transfer of a promissory note by indorsement, furnishes a sufficient consideration for a promise by the indorsee, to pay the indorser an equivalent sum, and the *onus* of showing a failure of consideration, is then thrown upon the indorsee." This being the law, it follows, that the indorsement of the Arringtons' note was *prima facie* an equivalent for the specialty on which the action in the case at bar is founded, and it devolves upon the defendants to show that the consideration of the latter has failed.

By the act of 1828, as explained by that of 1829, it is declared, that all contracts in writing, for the payment of money, &c., saving those governed by the rules of the law merchant, &c., may be assigned as heretofore, and the assignee may maintain suit thereon, &c. Provided, it be brought to the first Court of the county where the maker resides, to which suit can be brought, and if he fail to sue the maker, &c., the indorser shall be discharged, unless suit shall be delayed by his consent. When the sum due does not exceed fifty dollars, suit is required to be brought within thirty days after it becomes payable; or if indorsed after maturity within thirty days after the indorsement; unless the indorser consent *in writing*, that further time may be given to the maker or obligor; or unless the maker, &c., is absent from his residence, or it is unknown, unless the indorser require *in writing* the indorsee to bring

suit immediately, &c. [Clay's Dig. 383, § 12, 15.] It is perfectly clear, that where the sum due exceeds fifty dollars, that the act cited does not require that the indorsers consent to delay suit against the maker should be in writing; such a requisition is only made where the amount is within the jurisdiction of a justice of the peace. The statute being out of the way, there is no rule of law, or policy to prevent a verbal consent from binding the indorser. This conclusion being attained, it follows, that the plaintiff's consent not to sue the Arringtons to the first Court after their note matured, was equally available for the defendants, whether verbal or written.

In inquiring whether the consideration of the writing now in question has failed, it is not important to consider whether the Arringtons' note was regularly indorsed, both by the payee and the plaintiff. That would be a material inquiry on the trial of an action against the plaintiff upon his indorsement; for in the absence of consent countervailing the requirement of the statute, greater diligence would be required of the indorser in the one case than the other. But in the present case, the failure of the defendant, Allen, to pursue his remedy with promptness against the makers of the note indorsed to him, cannot prevent him from insisting upon a failure of consideration, if that remedy would have been unavailing; or, to speak with more plainness, if the Arringtons were insolvent before a judgment could have been obtained against them, and made productive, and still continue so, although no suit was brought against them, the plaintiff cannot recover. Where one person gives to another his note, and receives the note of a third person, indorsed by the payee in exchange, the insolvency of the maker of the latter may be shown by parol evidence, so as to defeat the recovery of the former. It is only in an action by the indorsee against the indorser as such, that the inability of the maker to pay, must be shown by the production of an execution returned "no property found." This results from the express provision of the statute. [Clay's Dig. 383, § 16.]

To entitle the defendants to insist upon a failure of consideration, it was not necessary that Allen should have released the plaintiff from his indorsement, to the extent of the sum the latter is now seeking to recover. If the plaintiff is unsuccessful in this case, he may claim a deduction *pro tanto*, if liable

upon his indorsement. The pendency of the action against him in Sumter cannot prejudice the defence which the defendants have interposed. That suit may well be prosecuted to recover the price of the negro, the purchase of which by the plaintiff, seems to have induced the transaction out of which the controversies between the parties arose.

If the Arringtons should ever become able to pay the judgment against them, and the plaintiff made liable as an indorser, he will be entitled to the judgment in order to reimburse himself. He cannot then object to the defence set up in this case, that a part of the judgment was not assigned, since, upon paying so much as Allen was entitled to, he will become its sole proprietor.

This view of the case will show that the plaintiff is not prejudiced by the adjudication of the legal questions in the Circuit Court. True, the law is not laid down with exact accuracy, but quite as favorable to the plaintiff as we have stated it. The admission of the record adduced by the defendants, and the charge in respect to it, related to an immaterial fact, and whether proper in the abstract, or not, could work no injury to either party.

The consequence is, that the judgment is affirmed.

LAWSON v. OREAR.

1. A party complaining of error must show sufficient matter in his bill of exceptions to create the presumption of injury, as well as of error, and this is shown whenever the evidence admitted against an exception is *prima facie* irrelevant, or illegal.

2. Reputation is not admissible evidence to prove insolvency, as that is the legal conclusion from facts to be stated; but reputation of facts or circumstances from which insolvency may be inferred, is proper evidence to go to the jury.

Writ of error to the Circuit Court of Talladega.

TRESPASS to try titles. The suit was commenced by John Lawson against Robert Lawson, but Orear was admitted to defend as the landlord of the defendant.

At the trial the plaintiff gave in evidence a regular chain of title from the United States to himself; the last link in this chain was a deed from one James Lawson. There was proof that James, was the brother of the plaintiff, and that Robert Lawson, the original defendant, was his father. Orear offered to prove that, according to general reputation, both Robert and James Lawson were insolvent, when the conveyance was made by him to plaintiff, and that Robert Lawson was so before that time. The plaintiff objected to this evidence, either as to James, or Robert, but the Court admitted it; and thereupon the plaintiff excepted. This is now assigned as error.

S. F. RICE, for the plaintiff in error, cited Carter v. Castleberry, 5 Ala. Rep. 277; 5 Porter, 382; Branch Bank v. Parker, 5 Ala. Rep. 731; Whitman v. Farmers' Bank, 8 Por. 258.

B. F. PORTER, contra, insisted, that there was nothing in the bill of exceptions to show, that injury resulted to the plaintiff from the charge, and, therefore, if erroneous, the judgment ought not to be reversed for the error of the charge. [Johnson v. Ballew, 2 Porter, 29; 3 Ib. 155; 1 Ib. 479.] The inquiry as to the insolvency may have been collateral, and in that aspect the evidence was proper. [Ward v. Thompson, 5 Porter, 384.] The party complaining of the error, must show the relevancy of the evidence. [Clendenning v. Ross, 3 S. & P. 267; 1 Porter, 139; 1 Ala. Rep. 517; Ib. 582.]

GOLDTHWAITE, J.—1. The defendant, insists, that if the admission of general reputation as to the insolvency of the persons named in the bill of exceptions is conceded to be erroneous, yet the judgment ought not to be reversed, because it is not affirmatively shown how this evidence prejudiced the plaintiff. The rule certainly is as stated by the counsel, but the presumption of injury arises whenever irrelevant, or illegal evidence, is forced on a party against his exception. This question has recently been presented to us in a great variety of aspects, but has uniformly received the same answer, to wit: that

it is incumbent on the party complaining, to show sufficient matter in his bill of exceptions to create the presumption of injury, as well as of error; and this is shown whenever the evidence admitted against an exception, is *prima facie* irrelevant or illegal. If a state of facts exist, which has the effect to destroy the *prima facie* intendment, it would be proper for the judge allowing the exception, so to explain it; or, if not sufficiently stated by the party, to refuse to allow the bill. In the present case, the objection is taken to the admission of this evidence, and as *prima facie* it is irrelevant, the objection, for this reason, should have been sustained; or, if a sufficient cause was supposed to exist for its admission, in connection with other evidence, or in a different aspect of the case, that should have been shown. As the case is stated, the irrelevancy of the evidence admitted, is a sufficient reason for the reversal of the judgment.

2. But if we should assume that the contest before the jury was such as would render proof of the insolvency of both, or either of the Lawsons admissible, then our opinion would be, that this could not be proved by reputation. Such, indeed, seems to have been the conclusion arrived at, in other cases in this Court. Ward v. Henderson, 5 Porter, 383; Branch Bank v. Parker, 5 Ala. Rep. 731; though the precise question involved here, was not directly presented in either of the cases just cited. It will be seen that the evidence allowed to go to the jury in this case was, that the Lawsons, according to general reputation, were insolvent, at the time, when the land in controversy was conveyed by James Lawson to the plaintiff. Now, it seems to us, that insolvency is rather the conclusion which the law deduces from other facts, than a fact by itself; and therefore it is quite probable that a witness would not be permitted to state this conclusion, independent of the facts from which it was to be inferred; but in most cases, where the question of insolvency is collaterally involved, it is nothing more than the attempt to show that the particular individual is not in a condition to be trusted as a debtor. In all such cases, the common question which suggests itself to every mind is, why is he not to be so trusted? or, what is his condition as to property, or credit, or the want of either? Every one in any considerable degree acquainted with the business community,

knows that the answers to these questions are exceedingly various; and that they as frequently depend on the reputation or character, which the individual has acquired, as upon any certain knowledge. Indeed, from the very nature of things, it is scarcely possible, that there can be any certain means of acquiring exact information upon such a subject. Individuals may present themselves as purchasers, each alike destitute of pecuniary means, and yet some of them may be as trustworthy and even safe debtors, as men of fortune; while some others would be entirely the reverse. What is the distinction between these classes, and how does it arise, if it is not in the reputation that each has acquired? So too in the case of men of pecuniary means, or possessed of property, it is highly improbable that one out of the hundred of those, who recognize and act with them as such, have any knowledge of their means or property. Indeed, in all, or in a very large majority of all the trading classes, the information of the seller, as to the ability of the purchaser to pay, is derived from reputation, and most generally from no other source whatever. To shut out from a jury the same evidence upon which the entire community acts, would present a singular result. It is certainly true, there is little to be found in the books upon this subject, but cases very analogous are not rare. Such are those, relating to the proof of marriage and character; the first of which is generally proved by reputation, and the last is capable of no other proof. It is very difficult to draw any distinction between the character of an individual as a correct member of society, and that which attaches to him in relation to his property, or the want of it; his punctuality, his business qualifications, his industry, or even his shrewdness. In the case of The State v. Cochran, 2 Dev. 63, the prisoner was indicted for passing counterfeit bills, and to repel the *scienter* which was inferable from circumstances, he proposed to inquire of a witness, if it was not generally understood and believed, by the neighbors and acquaintances of the prisoner, that he was a moneyed man, and had carried considerable money with him when he removed to Georgia. The inquiry was held to be proper, and the Court seemed to consider it difficult, if not impossible, to establish the same matter by any other kind of proof.

We have before adverted to the manner in which the ques-

tion was raised in the Court below, and stated our conclusion, that as insolvency is a legal conclusion, it cannot be proved by general reputation, but if the evidence had been to show the reputation of facts, or circumstances, from which this conclusion might properly be drawn, we are unable to perceive any sufficient reason to exclude such evidence. Its effect when before the jury, is a matter which we need not now examine, though it is evident, it is entitled to little weight, when opposed by evidence of a more satisfactory character. [Weeks v. Sparks, 1 M. & S. 686.]

The result of our opinion is, the reversal of the judgment, and the remanding of the cause.

ALLEN v. CLAUNCH.

1. Objections of form, cannot be made to the declaration, on error, after verdict.
2. An allegation in the declaration, that the note was delivered to the defendant, is a clerical misprision, amended by other parts of the record, and therefore not available on error.
3. When an attachment is sued out on a debt not due, the cause is continued by operation of law, until the maturity of the debt, without any formal continuance being entered.
4. The submission of a cause to a jury, after a judgment by default, is a mere irregularity, not available on error.

Error to the County Court of St. Clair.

Assumpsit by the defendant, against the plaintiff in error, on a promissory note, commenced by attachment. At the return term, January, 1841, the declaration was filed: "For that, whereas, heretofore, to wit: on the 11th February, 1840, at, to wit, &c., the said James H. Allen, made his certain promissory note in writing, bearing date the day and year aforesaid, whereby he promised, on or before the 15th October next, (which

time has long since elapsed,) to pay Joseph Claunch, or order, three hundred dollars, for value received of him, and then and there delivered the same to the said *James H. Allen*, and afterwards, on the day and year last aforesaid, at, to wit, &c., the said James H. Allen made his certain other promissory note, in writing, bearing date the day and year last aforesaid, whereby he promised to pay, on the 25th December, 1841, to Joseph Claunch, one hundred dollars, value received of him, and then and there delivered the same to the said Joseph Claunch, yet the said defendant, &c.

No entry appears to have been made at the June term, 1841.

At the January term, 1842, a judgment was rendered by default, and afterwards a jury was impanneled, who returned a verdict for the plaintiff, upon which the Court rendered judgment.

The errors assigned are—1. The Court erred in the judgment rendered.

2. The action was discontinued by the omission to continue, or take any step in the cause at the July term, 1841.

3. In rendering judgment by default, and then submitting the cause to a jury.

4. In rendering judgment for the plaintiff in attachment, when the declaration shows that the note first described, was delivered, not to the plaintiff, but to James H. Allen, the defendant.

Rice, for plaintiff in error, contended that the declaration was uncertain, insufficient and repugnant. The action being founded on notes in writing ascertaining the amounts, it was the duty of the clerk, under the direction of the Court, to assess the amount due.

The proceedings ought to have been stayed until the demand matured. The debtor has, until the first term after the maturity of the debt to plead. [1 Ala. Rep. 199.] The proceedings not being stayed, or the cause continued at July term, 1841, the cause was discontinued.

He also referred to 2 Cooke's Rep. 303; 6 Com. Dig. 266, 269.

ORMOND, J.—The objections made to the declaration, are matters of form, and cannot be raised in this Court, setting forth as it does a substantial cause of action. The allegation that the note was "delivered to James H. Allen," is evidently a mere clerical misprision, which is amended by other parts of the record. The description of the date of the second note, that it was made "on the day and year last aforesaid," we understand to refer to the alledged date of the first note. But if we are mistaken in this, the objection could not be made on error; if the date of the note was blank, the time when it became due, being alledged, would be sufficient, no objection being made in the Court below.

Nor can it avail that there was no formal order made, that the proceedings be stayed until the maturity of the note, as the proceedings were in fact stayed. Nor was it necessary that an order should be made to continue the cause. The debt not being due when the suit was commenced by attachment, rendered it necessary to suspend all proceedings, until the debts matured and therefore the cause was continued at the intervening term, by operation of law.

The filing a declaration at the return term of the attachment, is not an irregularity which can be reached on error, as it could not, by possibility, cut off any defence, which the defendant might have desired to avail himself of, in the Court below.

It was not erroneous to submit the cause to a jury, though the Court might have rendered judgment upon the notes. It was a mere irregularity, which could not prejudice the defendant.

Let the judgment be affirmed.

JACKSON'S ADM'R. v. JACKSON AND ANOTHER.

1. Where the plaintiff consents to receive what is familiarly called a plea in short, the language of the plea will be fairly and liberally interpreted; consequently where a surety in a promissory note pleads to an action against him, "that without any consideration he placed his name to the note declared on, after the same had been made, executed and delivered to the payee, and by him accepted," his plea must be taken as a denial that there was such a consideration as would sustain his promise to pay.
2. One person entered into a contract with another, by which he was to receive his promissory note without surety, and the note was made and received; afterwards the payee called upon the maker for a surety, who accordingly, took the note, had it subscribed by a third person, and returned it to the payee: *Held*, that as there was no new consideration as between the payee and principal, and none whatever as it respects the former and the surety, the undertaking of the latter could not be enforced.
3. To show that a promissory note was signed by a surety without consideration, it is competent to prove by parol the agreement between the payee and the principal, its making and acceptance by the payee, and the circumstances under which the surety subscribed it.

Writ of error to the Circuit Court of Sumter.

THIS was an action of assumpsit at the suit of the plaintiff in error on a promissory note of the following tenor, viz: "One day after date, I promise to pay Hiram Jackson, administrator of the estate of Randal Jackson, deceased, or bearer, the sum of four hundred and twenty-seven dollars and ten cents, for value received. This the 9th April, 1841.

PETER JACKSON.
DRURA JACKSON."

Drura Jackson pleaded, 1. Non-assumpsit. 2. That without any consideration he placed his name to the note declared on, "after the same had been made, executed and delivered to the payee, and by him accepted." The plaintiff demurred to the second plea, and his demurrer being overruled, issue was joined upon both pleas. A judgment by default was taken against Peter Jackson, the cause was submitted to a jury to try

the issues, a verdict returned for the defendant therein, and judgment rendered accordingly.

On the trial, the plaintiff excepted to the ruling of the Court. From the bill of exceptions, it appears that the plaintiff read the note set out above, to the jury; thereupon the defendant offered to prove by one Coleman, that on the day of the settlement, and date of the note, it was agreed between the plaintiff, as administrator of the intestate, therein named, and the other legatees, that they would settle by note, without any security; that Peter Jackson then alone signed the note in question, and the plaintiff took it, and went out of the clerk's office; but returned in one or two hours, and said he was not satisfied with Peter Jackson's note. The plaintiff objected to the admission of this evidence, but his objection was overruled, and it was permitted to go to the jury to show a want of consideration.

W. & J. Webb, for the plaintiff in error, made the following points: 1. The demurrer to the defendants second plea should have been sustained, because the plea does not answer the declaration, which sets out a joint, as well as a joint and several contract; and if a consideration passed to Peter Jackson, that was sufficient to bind his co-defendant. The plea is double, in objecting that the note is not sustained by a consideration as to one of the defendants, and that he is not bound by his signature; further, it is uncertain what particular fact it proposed to put in issue. 2. The testimony of the witness should have been rejected, because it went to change the contract from a joint to a several contract, thus making Drura Jackson a guarantor instead of a joint promisor. He cited Step. Plead. 299, 300; 1 Stew. Rep. 57; 1 Saund. Rep. 211, b; 16 Pick. Rep. 52; 1 Caine's Rep. 45; 1 Saund. Pl. & Ev. 147; Poth. on Obl. 176, 198, 296; 27 Am. Jurist, 455; 2 Ala. Rep. 280; 5 Id. 521.

R. H. Smith, for the defendant, insisted, that a consideration moving to Peter Jackson would not sustain the promise by the defendant, which was made after the note was accepted by the payee. If the plea had merely alledged the want of consideration, it would have been good, (3 Ala. Rep. 316;) and it cannot be bad because the defectiveness of the consid-

eration is particularly stated. The evidence objected to, may not have been sufficient to establish the truth of the issues or either of them, but it was certainly pertinent, and that would authorize its admission. If it was insufficient to make out the defence, the plaintiff should have prayed the Court to instruct the jury specifically. It was not obnoxious to the objection, that it contradicts the writing. [2 Ala. Rep. 285.]

COLLIER, C. J.—The pleadings in this case seem to have been made up by consent of parties, without any particular regard to form—the first plea, being the title of the general issue merely, and the second affirming only what is said in the statement of this case, and in the terms we have there employed. As the counsel of the parties have been thus liberal to each other, we shall endeavor fairly to interpret the second plea, without subjecting it to too rigid a criticism.

In alledging that the surety subscribed his name to the note, without any consideration, we are not understood that he merely denied, that as between himself and the payee there was a consideration. The allegation goes beyond this, and must be taken as a denial that there was such a consideration as would sustain his promise to pay. It would be an unwarrantable limitation of a general averment, to attain any other conclusion.

The question then, is, conceding the truth of the plea (as the demurrer does,) are the facts averred, an answer to the action. If necessary, we must intend that the plaintiff was authorized to agree with the distributees of the estate he represented, to receive their notes without security; especially as the reverse does not appear. It is alledged, that he did receive Peter Jackson's note, and that the defendant did not sign it, until after it had actually been accepted by the plaintiff. These facts show that it became a perfect security for money according to the agreement of the original parties to it, without the defendant's signature; and we will now inquire, whether it is essential to his liability, that there should have been some new, or additional consideration.

If one promise to pay for goods delivered to a third person, it is good at common law, and under the statute of frauds, if in writing; but where *one* undertakes to pay the debt of *an-*

other, the action will not lie, if the consideration be past at common law, nor if in writing, by the statute of frauds. [1 Dane's Ab. 109.] But in general, any act of the nature of a benefit to the person who promises, or to any other person upon his request, or any act which is a trouble or detriment to him to whom the promise is made, is sufficient; and the amount of benefit, or of trouble, or detriment, or its comparative value, in relation to the promise, is indifferent. In respect to the consideration necessary to bind a surety or guarantor, it is said, that a benefit to the debtor, without any benefit to the surety, is sufficient. [Bailey v. Croft, 4 Taunt. Rep. 611; Morley v. Boothby, 10 J. B. Moore's Rep. 395; Russell v. Mosley, 3 Brod. & Bing. Rep. 211.] But it is said, that the consideration must at the time the promise is made, be either wholly, or in part executory. Hence, it is said, if one promise in consideration of a credit already given, or agreed to be given, or of a debt already existing, it is an executed, or past consideration, and is insufficient; unless the act, though done, was done upon the request of the party promising. [Payne v. Wilson, 1 Man. & Ry. Rep. 708.] It therefore follows, that if a person accedes as a surety to an existing agreement, or guaranties an existing debt, for which there was a sufficient consideration as between the plaintiff and a third person, something new must take place, of the nature of a detriment to the creditor, or a benefit to the debtor or surety, to form a consideration for the engagement of the latter. [Theobald on Prin. & Sur. 6 to 9.] This view clearly shows, that the demurrer to the second plea was properly overruled.

The tendency of the evidence objected to, was to prove the truth of the plea, and the competency of the witness not being questioned, we think it could not have been excluded. Whether the testimony was sufficient, unassisted by further proof, to show the want of consideration to sustain the defendant's engagement, we need not inquire; for if pertinent, it was properly admitted, and the plaintiff could have prayed an instruction upon its legal effect.

It results from what has been said, that in the ruling of the Circuit Court, there is no available error; and its judgment is consequently affirmed.

ALSTON v. COLEMAN, ET AL.

1. The bequest of freedom to a slave after the determination of a life estate in the same slave, created at the same time, must be construed with reference to existing laws, and not with reference to laws as they may exist at the time when the bequest if effectual, would vest. Such a bequest is void under the existing laws, and therefore a bequest of money to the executor, to be used for the benefit of the slave is void, and it falls into the general residuum of the estate.

Writ of error to the County Court of Marengo.

On a final settlement of the estate of Jesse Coleman, deceased, in said Court, at the instance of William J. Alston, executor, an item of $1,500 in his account, was excepted to by the distributees of the estate. The executor claimed to reserve this sum, in accordance with a clause in Coleman's will, in these terms: "Then, out of the proceeds of said sales, I wish $1,500 to be reserved by the executors, to be applied to the use and benefit of the within mentioned child, Caroline, left to my wife during her life time, and which said $1,500, I wish used at the discretion of my executors, for the use of the said mentioned Caroline, and daughter of Tamer."

In a previous part of the will is found this clause: "I give and bequeath to my wife, Elizabeth, during her life time, a certain negro child slave, named Caroline, and at the death of my wife, it is my wish that the said child Caroline be set free." Tamer, the mother, is given to the same person in fee. Another bequest appears in the will, of a slave named Dave, to one of the testator's sons, to hold for the term of twenty years, after which lapse of time, it is his earnest request and desire that the slave should be set free.

The judge of the County Court decided, that the bequest of $1,500 for the uses expressed was illegal, and decreed it to be distributed in common with the general residuum. The executor excepted to this decision, and it is now assigned as error.

Lyon for the plaintiff in error.

GOLDTHWAITE, J.—We had occasion in the case of Trotter v. Blocker, 6 Porter, 269, to examine the question of capacity of an owner of slaves in this State, under its laws, to emancipate them by will. We then came to the conclusion, that they can only be made free in the mode, and manner provided by statute.

That decision necessarily covers this case, in one aspect, unless the intention of the testator to defer the gift of freedom until after the determination of the life estate created in the slaves, makes an available distinction. And at first, we were inclined to think that such a distinction could be drawn, so as to bring this within the influence of the decision made by the Court of Appeals of Virginia, in the case of Pleasants v. Pleasants, 2 Call. 270. There the will was made at a period, when, as here at present, emancipation was prohibited; but the will directed the slaves should be free at the period when they respectively should attain the age of thirty years, *if the laws of the State would then permit them to be so.* The Court held this bequest was valid; and as the law was changed in that State some few years after the death of the testator, the slaves were declared entitled to freedom.

The difference between that will and the one before us, is, that in this the important words *if the laws will then permit,* are omitted; and though, at first, we inclined to the opinion that the testator's intention ought to be construed with reference to such laws as should be in force when he directed the slave to be freed, yet, further reflection has satisfied us that such is not the correct rule to interpret, or to give effect to this or any other will. This will be entirely evident if we suppose the devise of an estate in lands, by such words as would now constitute a contingent remainder in tail, if our statute prohibiting such an estate was not in force. Under such a devise, the remainder man would take a fee simple, although previous to the vesting of the remainder, the law should be changed. So a similar limitation in remainder, by words which, under the existing law, would import an indefinite failure of issue, could not, it is supposed, impair the quality of the estate which the remainder man would take, although the law should be changed before the happening of the contingency upon which the estate was to vest. The reason would be, that

all men are presumed to make their wills deeds, or contracts, with reference to the existing laws, unless the contrary is clearly expressed. A contract entered into now, for the payment of money at a future day, to bear ten per cent. interest, would not be valid, though it might be, if the condition was added, *if the law will then permit*, and the law was afterwards changed. The case of Moses v. Denagree, 6 Rand. 561, decided in the same Court as was that of Pleasants v. Pleasants, is the same in effect as this, There, at a time when emancipation was prohibited, a slaveholder, by deed, attempted to manumit a slave at a future day. At the same time, by his will, he bequeathed the services of the slave until the slave should be free, and referred to the deed as having performed that act. Before the period came, an act was passed allowing emancipation, but the Court held, that neither will, or deed, was effectual for that purpose.

For these reasons, and under the influence of this authority, we are constrained to declare the will ineffectual to emancipate the slave Caroline; and upon this conclusion, it seems well established by all authorities, that the trust created for her benefit is illegal, and falls into the general residuum of the estate. It has been held that a devise of lands, in trust for the maintenance of a slave is void. [Cunningham v. Cunningham, 2 C. & N. 353.] So a bequest of goods and chattels for the use of such persons. [Haywood v. Cresen, 2 Car. L. R. 557.] And such also was our conclusion in Trotter v. Blocker and wife, 6 Porter, 269.

The result is, that there is no error in the judgment of the County Court, and its judgment is therefore affirmed.

LAROQUE & HATCH v. RUSSELL.

1. Under the pleas of failure, and want of consideration, the defendant may prove, that a note sued upon, though absolute in its terms, was given as an indemnity to the plaintiff, against loss as surety, as it is merely proving, upon what consideration the note was given.
2. Proof of the admissions of the plaintiff, that he had paid nothing on account of his suretyship, and did not know whether any thing was due or not, upon the note on which he was surety, does not prove that he cannot be damnified by his suretyship, and that therefore, the indemnity is *functus officii.*
3. Proof relevant to the issue cannot be excluded by the Court.

Error to the Circuit Court of Sumter.

Assumpsit by the defendant, against the plaintiff in error, on a promissory note.

Pleas, non-assumpsit, failure of consideration and want of consideration.

Upon the trial of the cause, the defendants offered to prove, that the plaintiff had admitted, that the note was made by the defendants, to secure the plaintiff, as one of the sureties of Laroque, to the Tombigbee Rail Road Company. That he had not been sued as surety for Laroque, nor had he paid any thing, and did not know whether any thing was legally due on the note, on which he was bound as surety. The Court on motion of the plaintiff, excluded the testimony from the jury, to which the defendants excepted, and which they now assign as error.

Greene, for the plaintiff in error, contended, that the evidence went to prove a failure of the consideration of the note, and was therefore admissible. That the testimony was relevant, and could not be excluded, because in itself it was not a full defence to the action. He cited 1 Ala. Rep. 357; Id. 41; Ib. 135; Ib. 660.

Metcalf and Baldwin, contra, for defendant in error. The evidence was offered to contradict the note—to prove,

that although absolute in its terms, it was merely intended as an indemnity. [1 Cow. 249; 1 Hill, 116; 4 Id. 584; 4 Litt. 167; 3 Starkie Ev. 1006, 1009; 1 Cowper, 47; 17 Pick. 417; 2 Ala. Rep. 280; 4 Id. 660.]

If it were given as an indemnity, the party to whom it was given may sue upon it. [7 Wend. 499; 8 Cowen, 639; 2 Bay. 145.]

The evidence was not relevant, unless connected with other facts, not shown to exist.

ORMOND, J.—The rule of law invoked by the counsel for the defendant in error, to sustain the decision of the Court in the rejection of the testimony, is the familiar and well known rule, that parol testimony shall not be received to add to, vary, or explain a written agreement.

The instrument in evidence, is, a note of hand, by which the plaintiff in error promised to pay the defendant, at a given time, seven hundred dollars. The evidence offered, is, that the note was executed as an indemnity to the defendant in error, as the surety of Laroque, one of the plaintiffs in error. Now, this is certainly nothing more, than proving upon what consideration the note was given, a point we believe, upon which there is no conflict of authority, or contrariety of decision, where the instrument is not protected from such a scrutiny, by the rules of the law merchant. See the numerous decisions on this head, collected in the 3 vol. Cow. & Hill, 1458, note 976. This privilege has, by statute, been extended to sealed instruments in this State.

If, in addition to the evidence above stated, the defendants had proved, that the liability of the plaintiff as surety for Laroque was at an end, and that he was no longer in danger of being damnified, the defence would have been complete; the indemnity had performed its office, and become *functus officii.* This their counsel insist, was the effect of the additional testimony offered by them, and excluded by the Court. The evidence was in substance, that the plaintiff admitted, that he had not paid any thing on account of his suretyship for Laroque, and did not know whether any thing was legally due or not, upon the note on which he was bound as surety. This is certainly not an admission, that his liability as surety had ceased.

The utmost effect that can be ascribed to it, is, that he had paid nothing as surety, and did not know that he should ever be called upon to pay any thing, which it is evident is perfectly consistent with an existing liability.

It is further insisted, that this testimony was relevant to the issue, and could not therefore, be excluded by the Court, and such is our opinion. The Court could not exclude the testimony, because unaided by other evidence, it would not maintain the issue of failure of the consideration of the note. The evidence offered being pertinent, and relevant to the maintenance of the issue joined, the Court had not the power to exclude it. If no other evidence had been offered, it would have been in the exercise of its legitimate province, in pronouncing upon its insufficiency, in its charge to the jury. See the case of Lester v. The Bank of Mobile, at the present term, where this rule is more fully expounded, and the previous decisions of this Court cited. Let the judgment be reversed, and the cause remanded.

WOOD v. McCAIN.

1. S., a practising physician, being about to leave home temporarily, made R. his agent by verbal appointment, with a general authority to transact all business for him in this State, and left with him his books and accounts for professional services, "*for settlement:*" *Held*, that as it respected the books and accounts, the authority of the agent was restricted by the terms "for settlement;" and he was not authorized to assign them to a surety of his principal, to indemnify the surety against the consequences of his suretyship.
2. Where a principal, with a knowledge of all the circumstances of the case, deliberately ratifies the acts, doings, or omissions, of his agent, he will (in general) be bound thereby, as fully to all intents and purposes as if he had originally given him direct and ample authority in the premises. But where a third person acquires rights after the act is done, and before it has received the sanction of the principal, the ratification cannot operate retrospectively, so as to overreach defeat those rights.

3. Where one acting as an agent of a third person, goes beyond his authority in making an assignment of debts due his principal, and a creditor of the principal causes a garnishment to be served upon his debtor, the subsequent ratification of the assignment by the principal cannot overreach and defeat the lien of the garnishee.

Writ of error to the Circuit Court of Talladega.

The defendant in error having recovered a judgment against Wm. A. Revis and Elisha B. Stedman, made the affidavit required by statute, and caused a garnishment to be issued and served on sundry persons supposed to be debtors of Stedman, among whom were John S. Smith. This garnishee appeared and answered, that he was indebted to Stedman for professional services as a physician, rendered in 1840, to the amount, as he understood, of ninety-six dollars, which was due on the first of January, 1841. Some few days previous to the service of the garnishment, the garnishee was informed by Mathew Wood, that he need not consider himself Stedman's debtor any longer, that the books or accounts of the latter had been transferred to him. Wood produced no written transfer, and the garnishee made no promise of payment.

In conformity to law a notice was issued, requiring Wood to appear and contest with the plaintiff, the right to the money owing by the garnishee. Wood appeared, and an issue was made up and submitted to a jury for the trial of that question, who returned a verdict for the plaintiff, and judgment was rendered accordingly. From a bill of exceptions sealed at the trial of the facts of the case, and the ruling of the Court thereupon, may be thus briefly stated, viz: sometime before the garnishment issued, Stedman left the State on a visit, having first made Revis his agent by mere verbal appointment, with a general authority to transact all business for him in this State; he left with his agent his books and accounts for medical services, (including the account of the garnishee,) for settlement. Wood was informed that the plaintiff intended to garnishee the debtors of Stedman, and being a surety of the latter in a promissory note for one thousand dollars, discounted by the State Bank, immediately applied to Revis for indemnity against the consequences of his suretyship. Accordingly, on the 26th January, 1841, Revis executed a deed in Stedman's

name, transferring the books and accounts of his principal to Wood, and then delivered the same to the assignee, who forthwith notified the garnishee of the fact, and instructed him to pay what he owed to him, (assignee,) or his order.

The deed of assignment was rejected as evidence, because there was no written authority to execute it. About March, 1841, Stedman returned to the State, and on being informed of the transfer and delivery of the books and accounts to Wood, forthwith ratified the same.

The Court charged the jury, that it was not competent for Revis to make the transfer of the books and accounts, as he had done, and that the ratification did not legalize it.

S. F. Rice and T. D. Clarke, for the plaintiff in error, made these points: 1. Revis had a sufficient authority to execute the deed; it was not necessary that his agency should have been in writing. The delivery of the books and accounts was an act which Stedman's dissent could not have avoided; but if this be not so, his ratification was equivalent to a precedent authority. [Bates & Hines v. The State Bank, 2 Ala. Rep. 452; 1 Sch. & Lef. Rep. 22; 12 Johns. Rep. 102; 17 Mass. Rep. 98; 8 Pick. Rep. 9, and cases there cited; 15 Id. 302; 2 T. Rep. 188, note; 13 Mass. Rep. 178; Id. 379; 15 Id. 39; 4 Ala. Rep. 258.]

2. Revis was a general agent, and the presumption is, that he was authorized to make the assignment. The Court had no right to require written evidence under seal appointing the agent, as a condition of its admission; the deed was clearly admissible—the sufficiency of the evidence was a question for the jury.

W. P. Chilton, for the defendant in error, insisted, 1. Revis's was not a universal, but a general agency, viz: to transact all the business of his principal of a particular kind. [Paley on Ag. 199; Story on Ag. 18; 2 Kent's Com. 3d ed. 620–1; 15 East's Rep. 408] 2. The power conferred upon the agent, authorized him to settle and collect the accounts, not to give them away, not to transfer them at pleasure to the creditors of the principal, and thus determine which of his creditors should be first paid. A factor or agent cannot pledge the property of his principal, unless, perhaps it be a negotia-

ble paper, the rightful possession of which *prima facie* may confer such a right. [2 Kent's Com. 626; 1 Mason's Rep. 440; 1 McC. Rep. 1; 2 Mass Rep. 398; 7 East's Rep. 5; 1 M. & S. Rep. 140; Story on Ag. § 21.] 3. The agent had no authority to make the deed; the terms "general agent" and "agent generally," must be restrained to the business of the party, in respect to which, it is presumed, his intention to delegate the authority was principally directed. [Story on Ag. *supra.*]

COLLIER, C. J.—The precise language employed in the bill of exceptions, is this: "Stedman visited North Carolina and left Wm. A. Revis his general agent, or agent generally, (said Revis having no written authority,) to transact his business in this State; that he delivered up his books and accounts for medical services to said agent (including the account against garnishee) for settlement, and that said agency was advertised and generally known in the neighborhood."

It is supposed by the counsel for the plaintiff in error, that as Revis was the general agent of his principal, it must be presumed he was authorized to make the assignment in question. This conclusion is by no means a necessary sequence from the premises. General, are clearly distinguishable from universal agents, that is from such as may be appointed to do all the acts, which the principal can personally do, and which he may lawfully delegate the power to another to do. "Such an universal agency may potentially exist; but it must be of the very rarest occurrence. And, indeed it is difficult," says Mr. Justice Story, "to conceive of the existence of such an agency, inasmuch as it would be to make such an agent the complete master, not merely *dux facti*, but *dominus rerum*, the complete disposer of all the rights and property of the principal." Such an unusual authority will never be inferred from any general expressions, however broad, but the law will restrain them to the particular business of the party, in respect to which, it is presumed, his intention to delegate the authority was principally directed. Thus, if a merchant in view of his temporary absence, should delegate to an agent his full and entire authority to sell his personal property, to buy any property for him, or on his account, or to make any contracts,

or to do any other acts whatsoever, which he could do if personally present—these general terms would be limited to buying or selling, connected with his ordinary business as a merchant; and without some more specific designation, would not be construed, to apply to a sale of his household furniture, or library, or the utensils, provisions, and other necessaries used in his family. [Story's Ag. 20–1.]

The difference between a general and special agent, is said to be this: the former is appointed to act in the affairs of his principal generally, and the latter to act concerning some particular object. In the former case, the principal will be bound by the acts of his agent, *within the scope of the general authority conferred on him*, although those acts are violative of his private instructions and directions. In the latter case, if the agent exceeds the special authority conferred on him, the principal is not bound by his acts. [Id. 114; Paley on Ag. 199; 15 Johns. Rep. 44, 54.]

It is laid down, that an agent employed to buy, has no authority to sell, and *vice versa.* [Story's Ag. 81–2.] So an agency for the purpose of accepting or indorsing bills, or notes, does not authorize the agent to purchase or sell goods for his principal. [Id. 84.] And an authority to take a bond does not in itself embrace the power to receive the money due thereon, (Id. 88); nor has an agent, for the purpose of receiving a debt, the power, ordinarily, to receive it in any thing else than money, and then only when it is matured. [Id. 88–9.]

Where one is authorized generally to sign promissory notes for the debts of the principal, the authority cannot be implied to give notes to pay the debts of strangers; or to pledge the credit of the principal as a surety, for goods which were not bought for him, and which never came to his use. [Odiorne v. Maxey, 13 Mass. Rep. 181; Wallace v. The Branch Bank at Mobile; 1 Ala. Rep. 565.] In Rossiter v. Rossiter, 8 Wend. Rep. 494, it was held, that a power of attorney, to collect debts, to execute deeds of lands, to accomplish a complete adjustment of all the concerns of the constituent in a particular place, and to do all other acts which the constituent could do in person, does not authorize the giving of a note by the attorney in the name of the pricipal. *Further*, that the general words must be construed with reference to the matter special-

ly mentioned, and that the authority to make a complete adjustment, &c , did not authorize the giving of a note on the purchase of property. So it has been adjudged, that a power of attorney " to ask, demand, sue for, recover, and receive all such sum, or sums of money, debts, dues, accounts, and other demands whatsoever, which are, or shall be due, owing, payable, and belonging to us, or detained from us in any manner of ways or means, whatsoever, &c," does not authorize the attorney to compound for, receive and release, a sum of money which is not due and payable. [Heffernan v. Adams, 7 Watts' Rep. 716.]

In the case at bar, the general words are, " to transact his (the principal's) business in this State;" but as it respects the books and accounts for medical services rendered by Stedman, these words are restricted, by declaring, that they were delivered to the agent " for settlement." By this, we are to understand, that Revis was to collect, or it may be, otherwise settle these demands, with the persons from whom they were due. It would require a most unwarrantable extension of terms, to hold, that they conferred the power upon the agent, to assign the books, and accounts, to a surety of his constituent for his indemnity. The citations we have made upon this point are pertinent, and most satisfactorily show, that the assignment in question was not authorized by the power previously given.

The assignment might, perhaps, be further objected to, for the reason, that Revis himself was an agent, with the power to settle the accounts, and could not delegate his authority, or appoint a sub-agent without the assent of his principal. [2 Kent's Com. 4th ed.; 1 Livermore on Ag. 54, 64; Story on Ag. 17; 2 M. & S. Rep. 299; 9 Ves. Rep. 251.]

It is insisted, that the assignment to the plaintiff in error being approved by Stedman after his return to this country, became as effectual for all purposes, as if it had been made in virtue of a previous authority. Mr. Justice Story says, " Where the principal, upon a full knowledge of all the circumstances of the case, deliberately ratifies the acts, doings, or omissions of his agents, he will be bound thereby, as fully, to all intents and purposes, as if he had originally given him direct authority in the premises, to the extent, which such acts,

doings, or omissions reach." [Story on Ag. 234–5.] If therefore, a party assumes to act, not for himself, but for another, without any authority, or the act exceeds the delegated authority, the subsequent ratification of the principal is obligatory upon him, whether the act be for his detriment or advantage. [Id. 237; 2 Kent's Com. 4 ed. 614–5–6; 12 Mass. Rep. 60–3; 13 Id. 182; 4 Wend. Rep. 465–7.] But it is said, that if the act of the agent be in the principal's name by an instrument under seal, without authority, the ratification must be under seal also. [Story on Ag. 237; 2 Greenl. Rep. 359; 12 Wend. Rep. 525. See also 7 T. Rep. 209; 14 Sergt. & R. Rep. 331.]

Now although the general rule is, that the ratification relates back to the time of the inception of the transaction, and has a complete retroactive efficacy, or as the maxim is, *omnis ratihabitio retrotiahitur*, yet this doctrine is not universally applicable. Thus, if third persons acquire rights, after the act is done and before it has received the sanction of the principal, the ratification cannot operate retrospectively so as to overreach and defeat those rights. If the law were otherwise, the constituent would be invested with the power of preferring his creditor in the present case, although his means of payment had been seized by an attaching creditor. We have seen, that the assignment in question, was inoperative, and ineffectual for all purposes, until after the return of Stedman when he approved it. This act of approval was entirely voluntary, and could not have been coerced. Previous to its ratification, the plaintiff below acquired a lien upon the debt owing by the garnishee, which could not have been defeated at the mere volition of the defendant in the judgment. To show that the ratification of an unauthorized act of an agent is thus limited in its application, we need but refer to Story on Agency, 241 to 244; Paley on Agency, 345 to 347.

The view we have taken is decisive of the cause. We will not stop to inquire, whether if Revis had authority to dispose of the accounts of his principal to indemnify a surety of the latter, an assignment (followed by a delivery of the accounts) would be invalid, because it was executed under seal in virtue of a parol authority. Without adding more, the result is that the judgment must be affirmed.

BELL v. PHARR, ET AL.

1. In an action of detinue for slaves, the omission to ascertain the value of each slave by the verdict of the jury, is an error affecting the judgment, although the defect of the verdict is in valuing a mother and children, or children of the same mother together.
2. The identity, and value of slaves, are questions solely for the jury, and any evidence bearing on these points is proper.
3. Where a title to slaves is dependant upon the default of the grantor in not paying a specified debt, if there is a default, the extent of it is an immaterial inquiry.
4. Where receipts have been given by agents, they may be called as witnesses, and it admits of question if proof of their hand writing can be given; but such evidence is clearly not proper, without showing the receipts were in existence, or signed at the time when the authority continued.
5. There seems to be no reason why a recovery may not be had in an action of detinue, for a slave who dies pending the suit.
6. Actions of detinue involve the title to the chattel, at the commencement of the suit, and the writ is a sufficient demand.

Writ of error to the Circuit Court of Talladega.

DETINUE by Pharr, and Beck, v. Bell, to recover certain slaves. The declaration describes most of the slaves by their names and ages, but in some instances, when describing children, omits their names. As thus, Harriet, a woman about twenty-four years old, and her four children, viz: a boy about eight years old, a boy about six years old, and two other younger children of the said Harriet. And again: Milley, a girl, about nineteen years old, and her two children, viz: a boy about two years old, and her infant child. The separate value of each slave is not stated, but the allegation is, that together they are worth $12,000.

A demurrer was filed to the declaration, but there seems to have been no action upon it. The general issue is also pleaded, on which a trial was had.

At the trial, the plaintiffs offered in evidence a deed, executed by all the parties, on 17th August, 1839, by which deed Bell conveyed to Pharr and Beck certain lands and slaves, for the

purpose of securing them in the payment of certain notes described therein, due at intervals of one year from the 1st January, 1840, until the 1st January, 1845. The deed contains terms granting a personal estate in the lands and slaves, and is upon the trust and condition, that if Bell should fail to pay off and discharge, and as often as he should fail to do so, any of the notes therein described, as they should become due and payable, the said Pharr and Beck, or either of them, or their legal representatives, or either one of them, should take the property therein described into possession, or so much thereof as should be of value sufficient to pay off and discharge the note or notes, and all interest thereon, which may be due and unpaid, and after giving a prescribed notice, set up and expose the same property, or so much thereof as would be of value sufficient to pay off the note or notes then due. It also provides that this may be done as often as a default may happen, and that until a default should be made, Bell should continue in possession, &c. and if the whole number of notes should be paid without default, then the deed was to be void, otherwise to remain in full force.

The defendant objected to reading the deed, but the objection was overruled. The plaintiffs then proved, and read to the jury, several promissory notes, the same as are described by the deed. The plaintiffs next introduced a witness, who proved, that he, as deputy sheriff, executed the writ in this case, but never had the slaves in actual possession, nor had he seen them all; that at the execution of the writ, he took the bond on file, (a delivery bond required to be given in statutory actions of detinue;) that the names and descriptions of the slaves in the bond were given to him by Bell, and made out under his directions; and that Bell said the slaves were on his plantation in Talladega county. During the same conversation, Bell, said, the slaves belonged to his daughter-in-law—a young lady who lived in the house with him—but that her claim, he believed, was forfeited, for want of registration in time. The same witness also testified, he did not know all the negroes—that he knew some of them, and those that he knew were very likely.

The sheriff and his assistant who went to seize the slaves sued for, testified that when they called for them, Bell some-

times refused, and at other times agreed, to surrender them; he hesitated for two days, but finally sent his overseer for them; afterwards he called him back, and said he would give bond, which he did, with the descriptions before spoken of.

Another witness was called for the plaintiff, and asked if he knew the slaves mentioned in the writ? This question was objected to, but allowed by the Court to be answered. He answered that he knew part of the slaves, and such of them as he knew were a very likely lot. When the witness came to the names of such as he did not know, he was asked the value of likely slaves of the ages mentioned in the bond. This question the defendant objected to, but the Court allowed it to be answered.

The same witness also testified that the slaves known by him, and of which he spoke, were, for the time when he knew them, in the possession of the defendant.

The defendant gave evidence tending to show he was entitled to payments, and discounts upon the notes, which had been put before the jury, and which payments and discounts did not appear on the notes. He proved that he kept a boarding house and tavern at the Talladega mineral springs—that the plaintiffs, with their families, spent a portion of some three or four seasons with him, and gave evidence tending to show the amount and value of their board. The plaintiffs then offered in evidence their receipts, which they proved had been executed by persons who, at the time the receipts bore date, were the bar keepers for Bell, at his tavern, and that they were authorized to make settlements for tavern bills. The defendant objected to the reading of these receipts, but the Court admitted them.

It was shown in evidence, that one of the slaves sued for, had died after the action.

On this state of proof, the Court instructed the jury—

1. That the death of the slave after action brought, did not bar a recovery.

2. That to entitle the plaintiff to recover, the jury must be convinced, the slaves sued for, were those mentioned in the trust deed—that they were in the possession of Bell when the suit was commenced, and that there was a default by him in the payment of the notes set out in the deed of trust.

3. That it was unnecessary for the plaintiff to prove a demand of the slaves before action brought, but that the plaintiff could only recover so many of the slaves as should be clearly sufficient to pay so much of the indebtedness secured by the deed as was due, and unpaid, at the time the action was commenced.

4. That Bell was estopped by the execution of the trust deed, from asserting that the title to the slaves was in another.

5. That if the jury found for the plaintiff, their verdict should specify what particular slaves they so found, describing them by their names and ages, and assess the separate value of each one.

The defendant excepted to these several charges, as well as to the ruling of the Court upon his several objections to the evidence, questions and answers.

A verdict was returned by the jury in favor of the plaintiff, in which most of the slaves are designated by names and ages, and their value ascertained separately, but in several instances women and children are valued together, as thus: Harriet and two children, $1,100; two children of Harriet born since the execution of the trust deed, $300; Milley and two children, $1,000; Mary and two children, $900; Lucinda, $600, and two children, $300.

The defendant moved in arrest of judgment, that the verdict is uncertain, in not finding that the slaves are the same as sued for, and in not finding their separate values. The motion was overruled and judgment rendered on the verdict. In the judgment entry, the uncertainty of the verdict as to the identity of the slaves does not appear, but the assessment of their values appears in the same manner as before stated.

The errors are assigned in this Court by the defendant, upon all the questions raised by the exceptions, and also assigns that the judgment is erroneous in not ascertaining the value of each slave separately.

L. E. Parsons and S. F. Rice, for the plaintiff in error, made the following points:

1. The slaves to which the evidence referred was not shown to be the same as those conveyed by the deed.

2. The value of each slave ought to have been proved,

therefore it was improper to admit the question as to what the value of *likely slaves* was, the witness not knowing all of those said to be of this description.

3. The receipts ought not to have been read as evidence without proof that they were made at the time they bear date. [Baker v. Blackburn, 5 Ala. Rep. 417.]

4. There can be no recovery of a slave, which the evidence shows to be dead at the time of trial.

5. The action was premature, without a demand of the slaves, as the deed provides for the retention of the possession by Bell until default. The possession being lawful, could not be made otherwise, until a refusal to deliver, after the default.

6. Bell is not estopped by his trust deed, from showing that the title to the slaves is in another, especially when his own deed conveyed no title as against his ward, for whom he was bound to protect the property. The possession held by him was, in law, the possession of his ward. [Foster v. Goree, 5 Ala. Rep. 424.]

The judgment is clearly wrong in not ascertaining the separate value of each one of the slaves. [Brown v. Brown, 5 Ala. Rep. 508; Cummings v. Tindall, 4 S. & P. 357; Haynes v. Crutchfield, present term.]

W. P. Chilton, contra, insisted that many of the questions raised in this case, were covered by previous decisions. White v. Ross, 5 S. & P. 133, and Bettis v. Taylor, 8 Porter, 564, are conclusive that the death of a slave after suit, does not discharge the action.

No demand was necessary. [Vaughan v. Wood, 5 Ala. Rep. 304.]

As to the omission to ascertain the value of each slave separately, he conceded it to be erroneous, unless the peculiar condition of the slaves, as children, authorizes each to be valued with the mother. The law does not favor a separation when the children are of tender years. [McLane v. Spence, 6 Ala. Rep. 894; Cannon v. Jenkins, 1 Dev. Eq. 422; Fitzhugh v. Forte, 3 Call, 13.]

The rule itself, however, is not inflexible, for a flock of sheep is valued entire. [10 Coke, 119; 6 Litt. 104.]

GOLDTHWAITE, J.—The omission of the jury to ascertain the several values of all the slaves, covered by their verdict, being carried into the judgment, is a fatal defect, and was so held in an action of the same kind for the recovery of patents for land, in the case of Cummings v. Tindall, 4 S. & P. 357; and afterwards in Haynes v. Crutchfield, *supra.* It is certainly true, that our Courts have never recognized any course of proceeding, tending to authorize a forced separation of children of tender years from their parents, when slaves; but no such principle seems involved here, as the contingent value is for the protection of the defendant, if the thing recovered is incapable of being produced. The plaintiff by his writ of distringas can always compel the delivery of the specific thing, and a Court, most probably, would feel constrained to allow him to pursue his remedy by that mode of enforcing the judgment, unless it was informed its use could be only vexatious. In Buller's Nisi Prius it is said if no value is found, the defect cannot be supplied by a writ of inquiry.

As this error will cause a reversal, we shall only consider the other questions raised, so far as they may again enter into the case, for the reason that most, if not all, are so presented as to leave it doubtful if they enter into the final judgment.

2. As to the identity of the slaves and their respective values, these are questions to be determined solely by the jury, and the Court could not properly reject any evidence bearing upon these points. Some of these slaves were proved to be likely, whether all were so, or were of the same or different values, was a fair subject of discussion to the jury, but the defendant has no reason to complain of inferences against him, when the means certainly were within his power, of stripping all uncertainty from this part of the case.

3. The objection to the reading of the receipts to the jury we, perhaps, should feel constrained to disregard, inasmuch as it did not point specifically to the question of law discussed here; and it is as strongly inferable that the Court's attention was not drawn to the omission, to show the papers were made by the persons signing them, *at the time*, when they had authority from the defendant to act for him. There is another reason why, even if there was error in this admission of the evidence, the error cannot avail the defendant. It is, that the

whole inquiry into the extent of the default, if there was one, was immaterial. The deed authorized the plaintiff to take possession upon the happening of any default, and their right to do so, could only be gainsayed by showing an entire payment.

4. There is no question but that the several persons who gave the receipts, would themselves be competent witnesses to prove the payment or other discharge of the accounts, and there may be a doubt, whether any evidence could be given of their hand-writing. [Baker v. Blackburn, 5 Ala. Rep. 417.] But under no circumstances, could such evidence be proper, without showing the receipts were in existence, or signed at a time when the persons signing, had the authority from Bell to bind him. The circumstances of this case do not present the same question as was involved in Stark v. Keenan, 5 Ala. Rep. 590, as there, the writing proved was signed by an executor, who, by law, is invested with the power to bind his testator's estate, in the same manner as an individual may bind his own.

5. The question as to the slave which died pending the suit, is not important to be considered, for the reason that it does not appear to enter into the verdict. But if it was, we may remark, that there seems to be no good reason, why a recovery should be defeated, by an accident to property, over which the plaintiff had no control. Such was the conclusion of this Court in White v. Ross, 5 S. & P. 133, as well as of other Courts. See cases cited in Bettis v. Taylor, 8 Porter, 564.

6. In actions of detinue, which involve only the title to the slave at the time of suit brought, the writ is a sufficient demand. [Vaughan v. Wood, 5 Ala. Rep. 304.] If the defendant has any title, or right, by which he is authorized to retain the chattel sued for, it is matter of defence to the action.

For the error we have previously ascertained, the judgment is reversed and the cause remanded.

WORTHINGTON, ADM'R. v. McROBERTS & PORTER.

1. One who buys land, at a sale by order of the Orphans' Court, executes his notes for the purchase money, and is let into possession, cannot defend himself at law, when sued upon the notes, upon the ground that the title was not divested out of the heirs at law, and vested in him, by the decree of the Orphans' Court.
2. A plea of *ne unques administrator*, is a good plea in a suit commenced by an administrator, profert not being made of his letters of administration, and the note sued on, not being made to him as such.

Error to the Circuit Court of Benton.

THE action is brought by the plaintiff in error, on two promissory notes for $1,500, as administrator of Robert Porter. The declaration avers, that the notes sued on, were executed by the defendants, payable to the administrator of the estate of Robert Porter, deceased. That at the time of the execution of the notes, the plaintiff, and one Christopher C. Porter, were administrators of the estate of Robert Porter, and the promissory notes delivered to them by the makers. That afterwards, and before the commencement of this suit, Christopher C. Porter resigned the administration, of the estate, and that no one has been appointed in his stead, &c.

The defendants demurred to the declaration, and the Court overruled the demurrer. They then pleaded *non-assumpsit*, and "*ne unques administrator.*" To the last plea the plaintiff demurred, and the Court overruled the demurrer.

At the trial, as appears from a bill of exceptions, the plaintiff proved his appointment, the making and delivering of the notes, and the resignation of C. C. Porter.

The plaintiff proved that the notes were executed for the purchase money of land, of which plaintiff's intestate died seized, which land had been sold pursuant to an order of the Orphans' Court of Benton county, as part of the estate of plaintiff's intestate. That no bond for titles, or conveyance of the land, for the purchase of which the notes were given,

was made, by the commissioners appointed to sell the same, at the time of the sale, except the notes.

Plaintiff also introduced the proceedings of the Orphans' Court, for the sale of the land, including the petition, order of sale, the report of the commissioners appointed to sell the land, that they had made sale thereof, that they had sold the land to the defendants, and returned their notes, also the order of the Court, made upon the return, as follows: "The commissioners appointed to sell the real estate of Robert Porter, deceased, having submitted their report in writing, it is ordered, that the same be recorded. It is further ordered, that John Worthington, administrator of the estate of Robert Porter, deceased, entered into bond with security, in the sum of seven thousand dollars, before receiving said notes," &c. Also a further order, that he had given bond, and that the notes be delivered to him. He also proved that the purchaser, one of the defendants, went into possession of the land, and remained in possession two years.

This being all the testimony, the Court instructed the jury, that they must find for the defendant, to which the plaintiff excepted.

The assignments of error, bring to view the judgment of the Court, overruling the demurrer to the plea, and the matters set out in the bill of exceptions.

Rice, for the plaintiff in error, cited Rhode's adm'r. v. Storr, at the present term; also Lamkin v. Reese, and Perkins' exr's. v. Winter's adm'r., at the present term; also 5 Porter, 169; 4 S. & P. 178, and 6 Ala. Rep. 411.

W. B. Martin, contra.

ORMOND, J.—In Harbin v. Levi, 6 Ala. 399, it was held, that where a contract was made with an administrator as such, no profert of his letters was necessary in a suit upon the instrument, because the party had admitted his right to sue, by making the contract with him in that capacity. In this case, the contract was not made with the plaintiff as administrator, or rather, it does not appear on the face of the contract, that it was so made, it was therefore necessary for the plaintiff to aver the fact in his declaration, and make profert of his letters of administration, though the omission would be cured by a verdict.

[Copewood v. Taylor, 7 Porter, 33.] It follows, that the demurrer was correctly overruled to the plea of *ne unques administrator.*

The decisions of this Court, cited by the counsel for the plaintiff in error, are conclusive to show, that the Court erred in its charge to the jury upon the evidence. We understand the objection to the proceedings in the Orphans' Court to be, that there was no order made by the Court, directing the title of the land sold under its order, to be made to the purchasers. It is doubtless correct, that until such order is made, the title of the heirs is not divested, as was held in Lightfoot v. Lewis' heirs, 1 Ala. Rep. 475, and again, in Bonner v. Greenlee's heirs, 6 Ala. Rep. 411 : but that would be no defence to an action on the note. In Rhode's adm'r. v. Storr, at the present term, we held, that a recovery could be had upon a promissory note given for the purchase of land, although the land had not been conveyed, and there was no memorandum, or note in writing, by the vendor, of the terms of the contract. That case, is certainly as strong as the present. Here the land was sold by order of the Orphans' Court, the notes executed for the purchase money, the sale approved by the Court, and the purchaser let into possession.

We need not now inquire, what the remedy of the purchaser is to obtain the title, though in Bonner v. Greenlee, 6 Ala. Rep. 414, it is intimated, that in such a case as the present, a decree could he made by the Orphans' Court, *nunc pro tunc,* divesting the title of the heirs at law, and vesting it in the purchaser. In Reese v. Lamkin, at the present term, it was held, that a purchaser at a sale of land, made by order of the Orphans' Court, could not obtain relief against his notes for the purchase money, he having gone into, and retained the possession, unless the heirs were unable, or unwilling to make title.

Whatever may be the right of the purchaser to relief in Chancery, he cannot defend himself at law upon the ground, that he did not obtain title to the lands. Let the judgment be reversed, and the cause remanded.

DAVIDSON v. ERNEST.

1. A person entered into a verbal contract for the purchase of a tract of land in fee, and in virtue thereof took possession and cultivated the same for two years, then abandoned the possession and renounced the contract—the vendor at the same time offering to make a deed for the land, which the vendee declined to accept: *Held*, that an action of *assumpsit* for use and occupation will lie at the suit of the vendor, to recover of the vendee for the two years permissive occupancy.

Writ of error to the Circuit Court of Butler.

THIS was an action of assumpsit at the suit of the defendant, against the plaintiff in error. Among other counts in the declaration, there is one which states, that the defendant on the first day of January, 1843, was indebted to the plaintiff in the sum of seventy-two dollars for the use and occupation of certain lands, &c., lying, &c., in the county of Butler, (which are particularly described,) with the appurtenances, &c., by the defendant at his request, and by the sufferance and permission of the plaintiff for a long time, viz: two years, &c.

From a bill of exceptions sealed at the instance of the defendant, it appears, that evidence was adduced by both parties, tending to show, that the defendant by verbal contract agreed to purchase, in fee, ten acres of land from the plaintiff. This contract was entered into in the year 1841, and the land was cultivated by the defendant in that and the succeeding year; in 1842 he gave notice to the plaintiff, abandoned the possession, and renounced the contract. At the time of such notice the plaintiff offered to make the defendant a deed for the land, which the latter declined accepting. This was all the evidence in respect to the defendant's occupancy.

The defendant prayed the Court to charge the jury that occupancy under a parol contract as proved, did not entitle the plaintiff to recover in the present action for rent. This charge was refused, and the Court charged the jury, that if the facts

above stated were true, they showed a right to recover rent for the time the defendant occupied the premises.

Thereupon the jury returned a verdict for the plaintiff for thirty-nine dollars and ninety cents, and judgment was rendered accordingly.

N. Cook, for the plaintiff in error, cited 6 Johns. Rep. 45; 13 Id. 488; 3 Conn. Rep. 303; 1 Stew. & P. Rep. 294; 4 Id. 170.

T. H. Watts, for the defendant in error.

COLLIER, C. J.—In Bell v. Ellis's heirs, 1 Stewt. & P. Rep. 294, it appeared that the widow of a deceased owner of land married again, and her husband entered into a contract with a third person for the sale of the land, under which the purchaser took possession. The land being subsequently sold by the administrator of the estate of the first husband, and purchased by another person, who it did not appear had any interest in the estate, an action was brought by the heirs of the decedent, to recover rent for the use and occupation, against the purchaser, from the husband of the widow. The Court held, that although the contract for the sale of the land was void, yet it had the effect to destroy the relation of landlord and tenant, which it was said, is essential to the maintenance of the action for use and occupation. *Further*, the action of assumpsit for rent, will not lie at the common law, except upon an express promise made at the time of the demise; this action is given by our statute of 1812, which is a transcript of the 11 Geo. 2d, ch. 19, § 14, and applies only where that relation is created by an agreement. In Hays v. Goree, 4 Stewt. & P. Rep. 170, the facts being briefly these; the plaintiff leased to the defendant by *parol*, a tract of land for the term of five years. It was proved that the latter took possession, and occupied for one year. The Court cite the case of Bell v. Ellis' heirs without disapprobation, and distinguish it from the case then in hand; because in the former there was a contract (though void,) for the sale *of the fee;* while in the latter there was a lease for a longer period, than the law authorized to be made *without writing*. It was supposed that the effect of the case referred to, was not to declare that an action for use and occu-

pation could not be maintained in any case, where there was a void contract for the possession. The learned Judge, who delivered the opinion of the Court, after citing several other decisions, makes the following deductions, viz: "Though contracts be void under the statute of frauds, so that the law will not enforce them, yet the maxim, *ex turpi causa, non oritur actio*, does not apply. If one has entered into such a contract and received value under it, the law creates a responsibility, and implies a promise to pay, or account to the other, according to the obvious justice of the case. In the present case, we think the parol lease, and the enjoyment of possession under it for a year or more, created the relation of landlord and tenant, at least for one year; and during this time the occupant would have been entitled to notice to quit; consequently the action was maintainable." Thus stands the law according to the decision of our predecessors, and we will now consider, how far the remedy upon a statute similar to our own, has been extended elsewhere.

It is laid down generally, that to sustain the action for use and occupation, a contract express or implied must be proved. [1 T. Rep. 378–387.] But it may be implied from circumstances; as where the defendant has entered into a contract of sale, which is abandoned, if the defendant's occupation has been *beneficial to him*, it is said he will be liable in this form of action. [Hearn v. Loudin, Peake's Rep. 192.] If the vendor has derived an equivalent benefit by the retention of the purchase money while the purchaser was in possession, he cannot recover for use and occupation where the latter abandoned the possession, because the former failed to consummate his title. [Kirtland v. Pounsett, 2 Taunt Rep. 145.]

In Smith v. Stewart, 6 Johns. Rep. 46, an agreement had been made between the plaintiff, and defendant, for the sale of land. The defendant, as purchaser, took possession, and afterwards refused to complete his purchase; whereupon the plaintiff brought an action for the use and occupation. In considering the question, whether that action was maintainable, the Supreme Court of New York said, that the statute of that State was substantially the same as that of 11 Geo. 2d, (already cited,) and applies only to the case of a demise, and where there exists the relation of landlord and tenant, founded on

some agreement creating that relation. That the defendant entered under a color of title, which might have been enforced in equity; by refusing to perform his contract, he became a trespasser, liable to be turned out as such, and responsible in that character for the mesne profits, but not as a tenant.

It has been decided, that where a tenant, under a parol demise, continues in possession after the expiration of his term, without a new agreement, his subsequent holding will be deemed to be, by the implied permission of the original lessor. [Osgood v. Dewey, 13 Johns. Rep. 240] The same doctrine was maintained, where the lessee by deed held over after the expiration of the lease; also, where there was a covenant contained in the expired lease for its renewal, though no rent was expressed for the subsequent term, and it was in other respects so uncertain, that the covenant could not be enforced under the statute of frauds. [Abeel v. Radcliff, 13 Johns. Rep. 297; see also Doe, ex dem. Rigge v. Bell, 5 T. Rep. 471; Little, et al. v. Pearson, 7 Pick. Rep. 301; Farley v. Thompson, 15 Mass. Rep. 18; Henwood v. Cheeseman, 3 Sergt. & R. Rep. 502; Sturdy v. Arnaud, 3 T. Rep. 599.] So it has been held, that assumpsit may be maintained upon the implied promise, arising merely from the use and occupation of real estate by permission, without any promise to pay rent. [Dunn v. Scovil, 4 Day's Cases, 229; Shattuck v. Ransom, 2 Aik. Rep. 252; Stoddard v. Newman, 7 H. & Johns. Rep. 251; Pott v. Lesher, 1 Yeates' Rep. 576; Eppes v. Cole, et al. 4 Hen. & Munf. Rep. 161.]

Mr. Dane says, that the action for use and occupation is of modern date, being given by statute, but in Massachusetts it has been used from the first settlement of the country, and extends to almost every case, where there is not a sealed lease between the parties, and a contract to pay rent is express, or can be implied—2 vol. chap. 55, page 441.

Hull v. Vaughan, 6 Price's Rep. 157, was an action for use and occupation, and elaborately and learnedly considered, both by the bench and the bar. One of the questions was, whether the action could be supported, where the evidence did not show the existence of the relation of landlord and tenant between the parties. The learned judges of the Court of Exchequer, were unanimous in their conclusion. All agreed, that there

was no contract, but a permission on one side and an enjoyment on the other. "It is not necessary," said Mr. Baron Graham, "in this species of action that the proper relation of landlord and tenant should be distinctly made out between the parties, because the action is calculated in form to meet cases where the parties do not bear those characters, if there be in point of fact an ownership on one hand, and an occupation on the other; and it should be liberally applied where it may be found to be a party's only remedy. My difficulty has been to reconcile that rule with the rule of Kirtland v. Pounsett, where the Chief Justice has certainly expressed himself very strongly against the implication of an assumpsit, where it was not in the contemplation of the parties. Although in raising an implied assumpsit, however, we may or may not be doing what was not in the contemplation of the parties at the moment, that should not be the only consideration with us in determining, whether this species of action can be maintained, or not." Without stating the facts of that case with minuteness, it is enough to say, that the defendant was the vendor of land, refused to execute his contract, obtained the possession by misrepresentation, and retained it when the plaintiff was entitled to it.

In Bell v. Ellis' heirs, neither the relation of landlord and tenant, or an occupancy by the permission of the plaintiffs, or any one acting for them, was established, but there was a contract of sale under which the defendant occupied the lands. From any thing appearing to the contrary, the defendant expected to execute his contract, and that the failure to consummate the sale, did not result from any fault of his. The conclusion of this Court, that the plaintiff could not recover for use and occupation, was clearly correct, but the reasoning employed in the opinion pronounced, went beyond this, and held, that it was essential to the maintenance of the action, that there should be a promise, either express or implied, to pay rent, resulting from a holding in the character of tenant.

So in Hays v. Goree, the judgment is equally proper. There the relation of landlord and tenant was shown to exist. The tenant took possession under a lease, that was merely void, because it was not in writing as required by the statute; placing the lease out of view, he was adjudged liable for use and oc-

cupation for a year, a verbal lease for that period being good. But in this case, the Court cite, without dissent, the reasoning of the previous decision, and the authorities on which it rests.

We see, then, that our own adjudications do not *bind* us to the stringent rule which maintains, that the action for use and occupancy, can only be maintained, where the relation of landlord and tenant is established. True, the opinions seem to go to that extent, but they went beyond what the facts of the cases made it necessary, and they can only be regarded authoritative, so far as they are strictly applicable to the facts. The reasoning and illustration of a Court, should always be most respectfully received, but where uncalled for, or inappropriate to the case in hand, it is not conclusive, even upon the tribunal which employs it.

The liberal construction given to the English statute, by the comparatively late case, cited from 6th Price, seems to us not to be an unwarrantable extension of its terms, when the spirit and design of the enactment are considered. It is certainly promotive of moral justice, as it encourages a plain, and simple remedy, for a right founded in the purest equity. Several of the citations we have made, show, that the enlarged rule laid down in that case, has been recognized elsewhere. As for the case cited from 6th Johnson, which affirms that a purchaser, under a contract which he refuses to execute, becomes a trespasser by his refusal, and an action for an implied assumpsit, will not lie to recover rent upon his occupancy, the reason on which the Court rests its judgment need but be mentioned to be repudiated.

The justness of the decision in Hull and Vaughan, is so apparent that, we are prepared to adopt it in the case at bar. Here the plaintiff was willing to execute the contract of sale, by making a title to the defendant, but the latter refused to consummate his purchase. The defendant entered and occupied by the plaintiff's permission, promising the latter that he would pay for the land; this promise he refused to perform. *Ex æquo et bono*, he is bound to pay for the time he occupied, and prevented the plaintiff from making a profit from his property; and the law will imply a promise accordingly.

The judgment of the Circuit Court is consequently affirmed.

McGOWAN, ET AL. v. THE BRANCH BANK AT MOBILE.

1. The rule of practice, which directs that all orders of publication, shall succinctly state the facts and objects of the bill, is of the same nature as the statute regulation requiring a copy of the bill to be served with the *subpœna;* but a mistake or even the entire omission to comply with the rule, is not available on error.
2. A discrepancy between the time at which the complainant prays the defendant may answer the bill, and that named in the order of publication is no error; the time in the prayer is immaterial, and in the publication, only so, as informing the defendant when he must answer.
3. Where the decree is founded on the masters's report, ascertaining debts to be due not covered by the bill, and entirely omitting those which are, it is error, although no exception was taken to the report, for on the face of the decree it is shown to be wholly disconnected from the case made by the bill.
4. When the allegations of a bill leave it uncertain whether a mortgage, sought to be foreclosed, was executed by two of the defendants or by one of them only, and the evidence in the cause does not remove the uncertainty, the objection is available on error, although no demurrer for this cause is interposed: but a reversal for such a cause carries no costs.
5. A power of sale given by the mortgage, does not divest a Court of equity of jurisdiction to decree a sale.
6. Where two mortgages are executed by different mortgagors, to secure the *same debt*, both may be foreclosed in the same suit.

Writ of error to the Court of Chancery for the first district, southern division.

Bill to foreclose, by the Bank against E. O. McGowan, Champ Taylor and Cynthia, his wife.

It alledges that Taylor, and McGowan, on the 27th May, 1840, were indebted to the complainant, $12,736 70, to be paid as afterwards stated; that the better to secure the same, on that day they executed their certain deed of mortgage, which the party asserted a readiness to produce to the Court, as it might direct. After setting out the description of the estate conveyed by the mortgage deed, the bill proceeds thus: "The above property, contained in the mortgage of E. O. McGowan

to the Bank, as aforesaid, and the following real estate, mortgaged to secure the same debt, as aforesaid, by E. O. McGowan, Champ Taylor and Cynthia Taylor." After this is a description of other real estate, and then the bill proceeds thus: "Which indenture of mortgage is subject to the condition, that if the said parties, or either of them, shall pay to the complainant, $12,736 70, due by four promissory notes, made by C. Taylor and indorsed by E. O. McGowan, all dated 25th May, 1840: the first at twelve months, for $2,733 39; the second at two years, for $2,994 01; the third at three years, for $3,309 68; and the fourth at four years, for $3,697 62, then," &c.

The bill alledges the non-payment of the notes, although long since due, and concludes with the usual prayer, and for a *subpœna* to all the mortgagors. It was filed 25th October, 1842. In the transcript is found copies of two mortgages, both purporting to have been executed the 27th May, 1840, one by McGowan, conveying the real estate first described in the bill; and the other by McGowan and Champ Taylor, and also by Cynthia, the wife of the latter, conveying the real estate last described in the bill. There is nothing to indicate that these copies were appended to the bill as exhibits or otherwise.

Service, as to Taylor and wife, was by *subpœna*, but was by publication as to McGowan, he being absent from the State. In the published order but one mortgage is named, and that is stated as executed by McGowan and Taylor, and McGowan is required to answer the bill by the first February, 1843.

At April term, 1843, a decretal order appears, overruling a motion to dismiss the bill for want of equity, on the ground, that the mortgages contain powers of sale. The bill was then also taken *pro confesso* against all the defendants. The entry recites, that the original mortgage and notes being produced, and proved in open Court, they were referred to the master, with the bill, to ascertain the amount due and owing to the complainant. The master reported, that he found due, on the 20th June, 1839, one note for $1,624 51; and on the 20th June, 1840, one note for $1,738 51, with interest on the same from the times they severally fell due. This report was affirmed, on the complainant's motion, and a decree founded on it was entered. The confirmation of this report, and the decree on

it, was set aside during the same term, and the cause seems to have stood continued.

At the April term, 1844, the report was again confirmed, and a decree made, that unless the sum reported to be due, was paid into Court by the first of May, the mortgaged premises should be sold.

The defendants to the bill prosecute the writ of error, and assign many reasons why the decree should be reversed. They are omitted here, because most of them are covered by the points made in argument.

STEWART, for the plaintiffs in error, submitted a brief presenting these points:

1. The bill is uncertain, indefinite, and contradictory. [Hartwell v. Wilkins, 6 Ala. Rep. 581; Whitaker v. DeGraffenreid, Ib. 303; 1 Bibb, 114]

2. Two mortgages cannot be joined in one suit, nor the remedies against divers defendants blended in one decree. [Mitford, 239, No. 181; Story Eq. Plead. 224; 5 Paige, 65, 78, 79; Hopk C. 234.]

3. The *pro confesso* decree is irregular, as it was taken under a defective publication. The 17th rule, Clay's Digest, 614, directs, that the facts and objects of the bill, shall be succinctly stated in the publication; and the 40th rule, (Ib. 616, § 40,) prescribes the time of, and manner of perfecting the service. Here the publication describes one mortgage only, and that as executed by McGowan and Taylor, which corresponds to neither of those set out in the bill. The time fixed by the order for the appearance of the defendant, is different from the prayer of the bill.

4. The report o the master, and consequently the decree, is unwarranted, as it contains debts not set out in the bill; and uncertain, as only one mortgage was referred or reported upon, and it is not stated which. [4 Porter, 246; 4 Litt. 258.]

5. The restitution bond is defective, for reciting only one mortgage as foreclosed.

6. The mortgage contains a power of sale, and therefore there was no reason for a sale under a decree.

7. The decree is that the whole land shall be sold. It may be that a portion of it will pay the debt, and therefore the

decree should have been so limited. The interest of Cynthia Taylor ought to have been reserved, until that of the other mortgagors was sold. [2 Paige, 301.]

No counsel appeared for the defendant in error.

GOLDTHWAITE, J.—1. We propose to consider the errors assigned here, in the order in which they are supposed to have occurred, in the course of the proceedings.

The objection to the publication, under which one of the defendants was before the Court, is, that one mortgage only is stated as the substance of the bill, and even that is improperly described. The 17th rule is of the same nature as the statute regulation, directing a copy of the bill to be served with the *subpœna*, (Clay's Digest, 351, § 34.) Both were intended to advise the defendant, of the description of the suit against him, but a mistake in the copy, or brief of the bill, or even its entire omission, does not give him a right to reverse a decree otherwise free from error, if the service, or publication, is in other respects in accordance with the statute. This is in direct analogy to civil causes, in which the omission to leave with the defendant a copy of the writ, is no cause for abating the suit, though such a copy is directed by statute.

2. Another objection to the publication is, that it requires the defendant to appear and answer the bill on the 1st of February, when the prayer of the bill is, that he shall answer at the next term of the Court; which term did not commence until after the day named. We are unable to comprehend the force of this objection, if it has any, and consider the time in the prayer as wholly immaterial; and that in the publication, only so, as informing the defendant when he must answer. Certainly he is not prejudiced, if the day named is a proper one, and no *pro confesso*, is taken until it has passed. The objection does not go to the time stated, but to the discrepancy between the prayer of the bill and the publication, and this we consider as presenting no available error.

3. There is, however, a fatal objection to the decree, without reference to the form of the bill. It refers to, and is founded entirely on, the master's report. That ascertains debts to be due, which are not covered by the bill, and those which are so covered, are entirely omitted. The consequence is, that a

decree is rendered, which, on its face, appears to be wholly disconnected from the case made by the complainant.

It generally is true, where a party to a bill is required to be present, when an account is stated, and he omits to except to it at the proper time, he will be concluded from afterwards raising objections to it. [Levert v. Redwood, 9 Porter, 79.] But this rule is inapplicable, when the report is solely upon matters not included in the reference, nor covered by the pleadings. [Levert v. Redwood, 9 Porter, 79; Adams v. Claxton, 6 Vesey, 226; Brodie v. Barry, 1 J. & W. 470.] By a reference to the bill, and to the report, it will be seen that the notes described in the one, are not the same, nor indeed, have any resemblance to those set out in the other.

4. The other errors insisted on arise, as is contended, out of the bill itself, and the first we shall notice, is as to its uncertainty. It is very justly considered, that many objections to a bill which would be fatal if taken on demurrer, are of no weight whatever, if made for the first time in an appellate tribunal; and the English rule is, that points not raised in the Court below, cannot be argued in the House of Lords. [McDonald v. McDonald, 1 Dow, 463.] The reason is, that the defect in the Court below, may be cured by an amendment, which cannot be done in the other Court. Another reason, too, not without its force, in most cases, is, that generally speaking, the evidence in the cause, enables the Court to see, to which of the repugnant, or uncertain allegations, the relief should be applied. It is evident, when the bill is taken for confessed, that the case is no more certain than it was before, unless the course of practice compels the complainant, in such a condition of the suit, to support his allegations by proof. In this case the uncertainty is, whether the mortgage first described in the bill was executed by McGowan alone, or by him and his co-defendant, Taylor. Now, when it is said the mortgage and the notes described in the bill, were produced and proved, we are not a point nearer certainty, than we would be without them, as we still do not know, whether it was executed by one or by both. Although we are strongly disinclined to sustain an objection of this nature, at this stage of a cause, it seems to fall within the rule recognized in the previous decisions. [Hartwell v. Wilkins, 6 Ala. Rep. 581.]

It is, perhaps, unnecessary to remark, that the reversal for an error like this would carry no costs.

5. There is nothing in the power of sale given by this mortgage, which deprives a Court of Equity of its jurisdiction. The circumstance, that, when the power is conferred on the mortgagee, he, as trustee, may be incapable of becoming a purchaser, is almost conclusive, as a reason, why the jurisdiction should be preserved, as from this, it is certain, the remedy under the power is not so full and ample as it is by a decree. All the authorities concur, that the jurisdiction of equity exists, as wel where there is a power to sell, as where there is none.

6. The only other objection we shall consider, is more general in its character. It is asserted, that inasmuch as there are different mortgagors to the two deeds of mortgage, they cannot be joined in the same suit, but that a separate bill, for the foreclosure of each is necessary. This proposition may be true when the debts, as well as the mortgages, are distinct; but here they are for the same debt, and therefore there is no pretence for several suits. Indeed, it may be questionable whether these defendants are not necessary parties, in a suit to foreclose either mortgage. How otherwise, if questions as to priority, or contribution, should arise, are they to be determined? But, independent of these questions, with which the complainant has no concern, in the first instance, there is no reason why he should be forced to pursue two suits, when one is sufficient, and no more, to enable him to obtain his rights. We think there is nothing in this objection.

7. The complainant, as before observed, has nothing to do in the first instance, either with the apportionment of his debt between the several mortgagors, or in the marshaling of the sale of the mortgaged estate. By the contracts, all of it is liable to the satisfaction of the debt, and if there is any reason, why one portion of the property should be sold sooner than another, it was for the defendants to disclose it. The apparent relation between them, as maker, and indorser, may not exist, or may be countervailed by some agreement. The Court of Chancery was not obliged so to shape its decree, as to produce effects which, when produced, might not have been accordant either with the wishes, or the contracts of the parties.

On the whole, we think there are no errors in the cause, oth-

er than those we have ascertained. As to those questions not examined, we have declined to express any opinion, for it is scarcely possible they can arise again in the suit.

The decree is reversed and the cause remanded, that the bill may be amended or dismissed.

SEXTON v. RONE.

1. A variance between the indorsement on the writ, and the declaration, cannot be pleaded in abatement; but if the plaintiff should declare upon a cause of action, entirely different from the indorsement upon the writ, the Court would on motion, refuse to permit the declaration to be filed.

Error to the Circuit Court of Tuscaloosa.

ASSUMPSIT on a promissory note. Upon the writ is an indorsement, that the action is on a note made by the defendant, to the plaintiff, on the 9th April, 1843, for the payment of ninety dollars on the first January after. The writ was sued out on the 16th August, 1843.

The declaration describes the note as due on the 1st June, 1843.

The defendant craved oyer of the writ, and indorsement, and pleaded in abatement of the writ. And another plea in abatement, likewise craving oyer of the writ, and indorsement, and pleaded in abatement, the variance between the writ and declaration.

The plaintiff demurred to these pleas, and the Court sustained the demurrers, and rendered judgment for the plaintiff, from which this writ is prosecuted, and which is now assigned for error.

MOORE, for plaintiff in error.

MARTIN & HUNTINGTON, contra.

ORMOND, J.—The design of the Legislature, in requiring the cause of action to be stated on the writ, was to apprise the defendant of the matter in controversy, and was intended as a substitute for service of a copy of the declaration previously required. In Wharton v. Franks, 9 Porter, 232, an attempt was made to plead in abatement, a variance between the indorsement on the writ, and the declaration, and this Court held, that the matter could not be pleaded in abatement. It would be perverting the intention of the statute, to entertain such a plea, the design being, not to give the defendant an opportunity of turning the plaintiff out of Court, because of some slight mistake, which had not misled him, but to apprise him of the matter he was to defend.

If, however, the plaintiff should declare for a cause of action entirely different from that indorsed on the writ, the Court would, on motion, refuse to permit the declaration to be filed. But where the defendant has been apprised, by the indorsement on the writ, of the true character of the suit, he cannot be permitted captiously to avail himself of a mistake, which has not misled him, and thereby pervert the statute to a purpose, never contemplated by the Legislature in the passage of the act.

Let the judgment be affirmed.

BONDURANT, ET AL. v. THE BANK OF THE STATE OF ALABAMA.

1. A surety when sued alone, may, by releasing his principal, make him a competent witness for himself; and where a bill of exceptions states that the principal received a release from the defendant (his surety,) discharging him from all liability in respect to the subject matter of the action, it will be intended that the release was unobjectionable in its terms.

2. Where it appears from a bill of exceptions that a surety who was sued, released his principal, offered him as a witness, and he was rejected by the Court, upon the ground of incompetency, it will not be presumed, in order to sustain the judgment, that it was proposed to elicit from the witness facts, in themselves inadmissible.
3. *Semble*—That although it may not be permissible in a proceeding against a sheriff and his sureties, to contradict the return made by the former on process, yet the Courts have an extensive control over their officers, and may permit amendments in their ministerial acts, so as to subserve right and justice.
4. A party as agent of one of several defendants against whom the sheriff held an execution, agreed with the sheriff to pay him at a future day, so much as he required of his principal, and made the payment accordingly: *Held*, that what the sheriff said at the time of his negotiation with the agent, was admissible as a part of the *res gestæ*.
5. The copy of a receipt for money, is not in itself, such evidence as should be permitted to go to the jury, yet it is allowable for a witness to inspect it, and if he can, then testify to the facts it discloses from his own recollection; but if he neither recollects the facts, nor remembers to have recognized the writing as true, while the facts were fresh in his memory, then the paper is nothing more than hearsay, and is incompetent evidence.

Writ or error to the Circuit Court of Tuscaloosa.

In this case, the defendant in error stated to the Court below, that on a judgment therein rendered in its favor, against Alfred Vaughan, a writ of *fieri facias* (particularly describing its amount,) was issued on the 25th October, 1836, which was placed in the hands of James M. Bondurant, then sheriff of Marengo, who returned it as follows: "Rec'd, 3d March, 1837, came to hand too late to make the money;" that the plaintiffs in error were the sureties of that sheriff in his official bond; *that the return of execution is false*, and thereupon they pray that an issue may be made up pursuant to the statute, to try whether the same be false or not. An issue was accordingly made up between the plaintiff below and the sureties, on whom notice of the suggestion was served; thereupon a verdict was returned for the plaintiff, and judgment was rendered accordingly.

On the trial the defendants excepted, and the bill of exceptions presents the following points: 1. The defendants offered the late sheriff, their principal, as a witness, and the plaintiff objected to his competency, although he was not a party to the proceedings. The objection was sustained. The witness then produced to the Court, a release from the defendants and

their co-sureties, discharging him from all liability to them, for any return and proceeding made by him, on, or in relation to, the execution in question; the plaintiff still objected to the competency of the witness, and the objection was sustained.

The plaintiff then offered the written statement of R. V. Montague, which is substantially as follows: In January, 1837, J. M. Bondurant, then sheriff of Marengo, informed the witness that he had an execution against A. G. Vaughan; that the execution indorsed "Bank of the State of Alabama v. A. G. Vaughan, fi. fa." and "No. 5628," is the one referred to. Witness informed the sheriff that he would pay it for Vaughan, as he had been directed by the latter to do so, that he would be glad if he (sheriff,) would allow him all the time he could; to which the latter replied, that if witness would pay at the next term of the Court, in March, that he would not ride to Vaughan's to make a levy, but would charge his commissions as if he had levied; that he would only require witness to pay but one half of the execution; the other half he would make of the other indorser, (—— Moore, of Demopolis.) Witness paid the sheriff, (as shown by his receipt,) a much larger amount, than could at that time have been made of Vaughan. The sheriff had ample time, after witness conversed with him, to have made the money, and witness has no doubt but he would have proceeded to levy, and make the money on the execution, had it not been for witnesses promise to him.

Being cross-examined, witness stated that the receipt referred to by him, is the one attached to the statement, that it is a copy merely, in the hand writing of a third person; that he did not see the execution at the time the sheriff first spoke to him about it, but he did, on the day he paid the money, and he believes the receipt is truly dated.

The defendants objected to so much of the statement as referred to the payment of the money mentioned therein, and so much as relates to the receipt attached to it; which objection was overruled, and the statement read, with the exception of the part of it which expresses the witnesses opinion.

E. W. Peck and L. Clark, for the plaintiff in error, made the following points: 1. The sheriff not being a party to the record, was a competent witness for his sureties. He was

released from all liability to them, and so far as interest was concerned, there was no objection to him; whereas, if the plaintiff was unsuccessful in his suit against the sureties, he might proceed against the sheriff himself. 2. The statement of Montague was read, subject to "all legal exceptions;" it was inadmissible, as it respects the conversation it relates, between witness and the sheriff. 3. What the witness said about the payment of money, on a certain day, should have been rejected, because he testified as to the day, from the copy of a receipt written by a third person.

B. F. Porter, for the defendant in error. The character of the release is not shown; it may have been defective; at any rate, to entitle the defendants below to complain that they are prejudiced by the decision against them, they should show affirmatively that the sheriff's testimony was improperly excluded. But, conceding that the release was operative, yet it only absolved the witness from liability in respect to the present proceeding, and was objectionable also, because it was not made by the party owning the interest. [2 Porter's Rep. 440-2; Greenl. Ev. 473.] The sheriff was an incompetent witness, because he was offered to vary his own return. [6 Conn. Rep. 400-4; 3 Yeates' Rep. 47; 1 Kinne's L. Comp. 379-38; 6 Ala. Rep. 253.]

It is difficult to conceive upon what ground the testimony of Montague should have been rejected—it is pertinent, and if it could not avail, the Court should have been asked to charge the jury upon its effect. [4 Ala. Rep. 265; Id. 494; 1 Ala. Rep. N. S. 83; 3 Id. 16, 371.]

COLLIER, C. J.—We are inclined to think that the interest of the sheriff was not balanced between the parties, so as to have made him a competent witness for the defendants, without a release. But that he might have been competent by a release, seems to be so firmly settled upon authority, as not to admit of serious doubt. Mr. Greenleaf, in his treatise on the Law of Evidence, (p. 472 to 4,) says, "The competency of a witness, disqualified, by interest, may always be restored by a proper release. If it consists in an interest vested in himself, he may divest himself of it by a release, or other proper con-

veyance. If it consists in his liability over, whether to the party calling him, or to another person, it may be released by the person to whom he is liable." Again, "A surety may always render the principal a competent witness for himself, by a release. And it seems sufficient if only the costs are released." Perryman v. Steggall and another, 5 Carr. & P. Rep. 197, supports the latter remark as to the extent to which the release should go; and the general principle, which maintains that a surety, when sued alone, may, by releasing the liability of his principal over, so as to destroy, or create an equilibrium of interest, render him competent as a witness, is sustained by many adjudications; see 1 Bailey's Rep. 83; 12 Pick. Rep. 565; 2 Monr. Rep. 100 1; 7 Watt's Rep. 292; 1 Rawle's Rep. 196; 16 Mass. Rep. 181; 2 Sergt. & R. Rep. 358; 20 Pick. Rep. 441. In the last case, the Court said, "If the plaintiff should fail to recover in this suit, a judgment against him for costs, would be no bar to his action against the witness, who would still be liable to an action for the amount of the note, in virtue of his several responsibility. The consequence is, that so far as the witness had any pecuniary interest, it was to charge the defendant, and thereby to exonerate himself from any further responsibility. But as he was called by the defendant, he was called to testify against his interest, and this does not affect his competency."

The cases cited, all proceed upon the assumption, that a verdict and judgment in favor of the surety, will not avail the principal, as a bar to an action at the suit of the plaintiff. This being conceded, it is difficult to conceive of any objection, where all interest is removed by a release. In the present case, from the generality of the objection, and the ruling of the Court, the reasonable intendment is, that the release was unobjectionable in its terms. Whether it should extend so far as to annihilate all interest, or merely to balance it, (which latter result would, perhaps, be produced by renouncing the right to the costs of the action,) we need not consider.

So far as the question of interest is concerned, the sheriff was made competent by the release executed by his sureties. As to the particular facts which it was proposed to elicit from him, we think there is nothing in the record to show, that they were not such, as he might not with propriety narrate. It may be,

that it is not permissible, in a proceeding against a sheriff, or his sureties, to contradict the return made by the former on process, yet the Courts have an extensive control over their officers, and may permit amendments in their ministerial acts, so as to subserve right, and justice. So that, although a record cannot be contradicted by evidence adduced on the trial of an issue, yet, upon motion to the Court, at the instance of the officer making it, it may be so corrected, as to conform to the truth.

2. Some of the American cases maintain that the admissions of a principal, made at any time, are evidence against his surety. See 5 Binn. Rep. 195; 10 Johns. Rep. 38; 2 Wash. C. C. Rep. 473; 3 Yeates' Rep. 128; 2 Bailey's Rep. 362, 380, et post; 2 Phil. Ev. C. & H's. Notes, 671 to 3. But the greater number of the adjudications, perhaps, restrict the rule to cases where the declarations of the principal are acts, or parts of acts, in analogy to the admissions of agents affecting their constituents. [4 Ala. Rep. 607.] On this principle, the entries of a teller, by which he daily stated his account, as such, in a book, kept in the Bank for that purpose, were received, to show his default in a suit against his surety. [1 Rep. Const. Ct. 404, 409.] So a jailer's receipt for a prisoner, was held receivable against his surety. [4 Litt. Rep. 148, 151.] And the return of a sheriff, that a *fi. fa.* is satisfied, will conclude the sureties, in an action on the bond. [1 Dev. Rep, 153; 6 Ala. Rep. 248.] The part payment by the principal of a promissory note, has been held to take it out of the statute of limitations, or to repel the presumptive bar arising from delay, in respect to the surety, who is jointly bound to pay it. [2 Pick. Rep. 581.] But the mere admission of the principal, after the statute has run, will not be received as evidence against the surety, to prevent its operation. [5 Binn. Rep. 195.] So it has been held, that the acknowledgment of a sheriff, made while he was officially acting in relation to the receipt of money, forms a part of the *res gestæ;* but if made at a subsequent period, they are inadmissible. [2 Blackf. Rep. 289; Greenl. on Ev. 219, 223.]

Here, it must be observed, that Montague in his negotiation with the sheriff, was acting as the agent of Vaughan, and the object of the sheriff was to obtain satisfaction of the execution, and the purpose of the agent, to obtain as long time as possible

for its payment. The time was agreed on, and the payment accordingly made. Under these circumstances, the statements made by the sheriff, must be regarded as part of the thing done, viz: *the payment of the money.* They were made in view of it, in reference to it, and for the avowed purpose of leading to such a result. In order to make the declaration a part of the act, it is not necessary that they should be simultaneous. True, if the act is never done, the declaration may pass for nothing, but when the performance takes place, it draws to itself the previous admissions and statements, of the parties, which led to it; for they are just as much parts of the act, as if made at the same time.

3. It is said a witness may refresh, and assist, his memory, by the use of a memorandum, written instrument, or entry in a book; and that it is not necessary that the writing should have been made by the witness himself, or that it should be an original, if, after inspecting it, he can speak to the facts from his own recollection. So where the witness recollects that he saw the paper, while the facts were fresh in his memory, and remembers that he then knew, that the particulars therein mentioned, were correctly stated. And a writing, which is in itself inadmissible evidence, may be referred to, by the witness, for the purpose of refreshing his memory. But where the witness neither recollects the fact, nor remembers to have recognized the written statement, as true, and the writing was not made by him, his testimony, so far as it is founded upon the written paper, is but hearsay; and a witness can no more be permitted to give evidence of his inference from what a third person has written, than from what a third person has said. [Greenl. on Ev. 483; 2 Nott & McC. Rep. 334; Minor's Rep. 397; 3 T. Rep. 752; 11 Wend. Rep. 485; 2 Phil. Ev. C. & H's. Notes, 754 to 759; 3 Id. 1238-9; 3 Porter's Rep. 430.] The copy of the receipt attached to the written statement, by Montague, is not, certainly, such evidence as should be permitted to go to the jury, yet it was allowable for the witness to inspect it, and, if he could, then testify, to the facts it discloses, from his own recollection; but if he neither recollected the facts, nor remembers to have recognized the writing as true, while the facts were fresh in his memory, then the paper is nothing more than hearsay, and is

incompetent evidence. But the bill of exceptions does not give us explicit information, whether the witness related the facts from memory, or whether the copy of the receipt was used as an instrument of evidence, and it is not necessary that we should now stop to inquire. What we have said, will guide the action of the Circuit Court. Upon the first point considered, we have seen, there is error; the judgment is, consequently, reversed, and the cause remanded.

WINSTON v. METCALF.

1. P. and W. are the joint makers of a note to one J. W., who assigns it to M., but previous to any notice to the payers of the assignment, P., one of them, acquired a note made by J. W. payable to one J. P., and by him assigned to P.: *Held*, in a suit on the note by M. against W., that the latter was entitled to the benefit of the set off held by his co-maker P. against J. W., on producing the note at the trial, with the consent of P. to use it as a set off.
2. An agreement, contained in the body of a note, purporting to be in consideration of the hire of slaves, to return the slaves clothed, as slaves usually are, is not assigned by the indorsement of the note, nor can the assignee maintain an action for the breach of it, when suing for the money due on the note.

Writ of error to the Circuit Court of Sumter.

Assumpsit by Metcalf, as the indorsee of a promissory note, described in the declaration, as made by Winston, for the payment of $200, to one Waller, on the 1st January, 1842, for the hire of two slaves, which were to be returned, clothed as slaves usually are. The breach assigned is, the nonpayment of the money, and the not returning the slaves clothed in the usual manner. The defendant, in addition to the general issue, with notice of set off, pleaded a special plea, to this effect: That the

note was made by one Pettus, and the defendant, the latter being a mere security; that Pettus, previous to the assignment of the note sued on, by Waller, to the plaintiff, had become the owner of a note made by the former, to one Pierce, for $125 50, due the 1st January, 1841, which note was assigned by the said Pierce, to Pettus, before any notice of the assignment of the note due to Waller. That the same was purchased as, and for, an off set to the note sued on, and for the joint account and benefit of the defendant and the said Pettus; and that the defendant, with the concurrence and consent of Pettus, produces the said note, so assigned, and offers to set off the same to part of the demand sued for. The Court sustained a demurrer to this plea, and at the trial, the same facts, in substance, were proved, before the jury, and also, that the defendant had no other interest in the note, than as an off set to this suit, and never had it in his possession, though it was produced in Court, and offered as a set off.

The Court rejected the set off, and this is now assigned as error, as is, also, the overruling of the demurrer to the plea.

Bliss and Baldwin, for the plaintiff in error, cited Minor, 321; 1 Ala. Rep. N. S. 93; Bab. on Set Off, 22; 8 N. H. 539; 4 Ib. 236; 3 Mon. 19; 4 Ib. 1; 4 John. C. Rep. 15; 13 John. 9; 3 Mason, 145.

Metcalf, contra, insisted that Winston had no interest in the note offered as a set off. [2 Ala. Rep. 675.] Besides, the general objection to the set off, as not being a debt between the same parties, a part of the demand sued for, is unliquidated damages, to which there can be no set off. [Williams v. Love, 2 Ala. Rep. 71; Chitty on Con. 658.]

A surety cannot set off the debt due to the principal. [Lyon v. State Bank, 1 Stewart, 442; Holmes v. Bullock, 4 Ala. Rep. 228; Clay's Digest, 382; Minor, 321.]

GOLDTHWAITE, J.—1. The validity of the set off produced at the trial, depends upon the construction of the statute of set off, in connection with other enactments supposed to bear on it. So much of that statute as affects the question now raised, is in these words: "In all cases where there are, or shall be, mutual debts subsisting between the plaintiff and the

defendant, or if either party sue or be sued, as executor or administrator, where there are mutual debts subsisting between the testator and the other party, one debt may be set off against the other." [Clay's Digest, 338, § 161.] This statute was enacted in 1807, at which time the enactment making joint obligations, &c., joint and several, had not been passed; nor was our present statute, securing the right of the maker of a note, to set off, against the assignee, any demand possessed against the note previous to notice of the assignment, then in force. At that time all promissory notes were assignable in the same manner as inland bills of exchange. [Laws of Ala. 67, § 1.] It is obvious therefore, when these statutes alone are regarded, the question here presented, could not arise; first, because a *bona fide* assignee took the note, discharged of all equities; and, second, because the plaintiff was then constrained to sue all the makers of the note jointly. The first change of law connected with this subject, was made in 1812, when the general negotiability of promissory notes was restrained, and a condition imposed upon their transfer. This condition is, "that the defendant shall be allowed the benefit of all payments, discounts, and sets off, made, had, or possessed, against the note sued on, previous to the notice of assignment, in the same manner as if the same had been sued and prosecuted by the payee." [Clay's Dig. 381, § 6.

It is clear, with reference to this latter statute, if the suit had been brought against both principal and surety, that the note offered as a set off must have prevailed, for the case then would be precisely the same as Pitcher v. Patrick, Minor, 321, where a debt due the obligee, from one of two obligors, was allowed as a set off to an action, by the administrator of the obligee, against both obligors. To the same effect is Carson v. Barnes, 1 Ala. Rep. N. S. 93. Both these decisions were doubtless influenced by another enactment, passed in 1818, which declared the effect of all joint obligations to be joint and several, and permitted the plaintiff to proceed against any one or more of the joint obligors, &c. [Clay's Digest, 323, § 61.] It is this statute which warrants the plaintiff in this suit, in proceeding against Winston alone; and it is insisted, the effect of it is, to prevent the introduction of any set off, exclusively owned by the other maker of the note, inasmuch as the

debt, in this condition of the case, cannot be said to be mutual. The strongest point of view, in which this case can be considered, on the part of the plaintiff, is, that the character of joint and several obligations, is not so completely changed, as to abolish the consequences which arise from the death of one of the makers; in which event, a complete legal remedy only remains as against the survivors; or, rather, there is not an unrestricted right to proceed against the personal representative of the deceased maker. This point received some consideration in the case of Von Pheel v. Connally, 9 Porter, 452. There the action was, by the assignees of a note, payable by two persons; to this action the defendant pleaded a set off, due by *open account*, from a firm, of which the payee of the note was a partner, and this was held not to be a mutual debt, within the meaning of the statute. The precise difference between that case and this, or the principle we are now considering, is, that no several suit, could have been brought against the person owning the account, inasmuch as demands of that description, are not made joint and several by the statute. It is perhaps, impossible to say, that this feature of joint obligations, remaining unchanged, may not have its effect in some cases, but what this effect is, it is improper to speculate on in advance.

Independent of any consideration, whether this is a mutual debt, within the terms of the general statute of set off, we think it is within the precise words of the restriction imposed on the assignment of promissory notes. When the plaintiff acquired his interest in the note sued on, it was affected with the right of the principal debtor, to set off the note, then held by him against the payee; and it seems to us, that this right can be in no wise impaired by any act of the plaintiff. True, he is entitled to sue either party severally, but it by no means follows, that when he does so, that he avoids any defence which could be interposed, if the suit was brought against the principal debtor. Any other construction of the statutes, will lead to the great injustice of allowing a party, by selecting one out of several persons, equally responsible to him, to avoid the just operation of the law.

The principal debtor is liable to indemnify his surety, whenever the latter pays the debt; and when the former has

procured a valid set off, we perceive no sound reason why the surety should not be permitted, with his consent and concurrence to enforce it, in the same manner as if the suit was against both, jointly. The case of Lyon v. The State Bank, 1 Stew. 442, does not assert a principle different from that now held; for there, no assent of the principal debtor was shown, that the money due to him from the Bank, and held on deposit, should be applied in discharge, or as a set off of the debt. We are not to be understood as disturbing those decisions, where we have held that a set off must be such a legal debt as will entitle the party offering it to maintain a cross action. [Crawford v. Simonton, 7 Porter, 110; French v. Garner, Ib. 549; Bell v. Horton, 1 Ala. Rep. N. S. 412; Adams v. McGrew, 2 Ala. Rep. 675; Holmes v. Bullock, 4 Ib. 228.]

2. It is also urged as a reason why this set off ought not to be allowed, that the action, in part, is brought to recover unliquidated damages, supposed to accrue from the omission of the makers of the note, to return the slaves, clothed in the usual manner. We apprehend, however, that no right to recover damages, on this account, passed to the assignee, inasmuch as the engagement, in this respect, is neither a promise to pay *money or any other thing*, and therefore is not assignable within the statute. In Virginia, it has been held, under a statute very similar to our own, that bonds, &c., with a collateral condition are not assignable. [Henderson v. Hepburn, 2 Call. 232; Lewis v. Harwood, 6 Cranch, 83.] Our statute, it will be seen, excludes the idea that such an agreement is assignable, and the only legal effect which can be given to the assignment of the note sued on, is, to consider it as investing the assignee with the right to sue in his own name, for the money promised to be paid.

From what has been said, it will be seen, that our conclusion is, that the plea is sufficient in law, as a bar for so much of the suit as is covered by the note offered as a set off. Also, that the evidence offered should have been admitted at the trial, on the other issue.

Judgment reversed, and cause remanded.

EX PARTE, SIMPSON.

1. When an application is collateral to the main question, where it is merely auxiliary to the suit, addressing itself to the Court and not to the jury, having no tendency either to prove, or disprove, the matter in controversy, but relating to the preparation of the suit for trial, the parties to the record are competent witnesses.
2. The sureties to a bond for an attachment, may prove that an affidavit was made, and is lost, so that another may be substituted.

Motion for a mandamus to the Circuit Court of Barbour.

MEREDITH B. OWENS commenced a suit by attachment, against Thomas Simpson, returnable to Barbour Circuit Court. The defendants, who were non-residents, appeared and pleaded in abatement, the want of a sufficient affidavit. The plaintiff alledged, that an affidavit had been made, "that said defendants had not sufficient property, within the State or territory, of their residence, to satisfy the debt, within the knowledge of affiant," and the same had been lost or mislaid, and moved for leave to substitute one in *lieu* thereof.

In support of the motion, the plaintiff read the *ex parte* affidavits of Isaac Johnson and Joshua A. Owens, parties to the attachment bond, as it appeared. To rebut the testimony, the defendants produced the attorney, who made the affidavit, upon which the attachment issued, and the justice of the peace who issued the attachment, both of whom swore, they did not remember the making of the additional affidavit, supposed to be lost, but said, they would not swear it had not been made. The justice had much business, and the attorney was sick, when the attachment was issued. The justice also swore, it was his habit to indorse the affidavit, upon the bond or writ of attachment, or, when written upon a separate piece of paper, to annex it with a wafer. The papers showed no mark of annexation. This being all the evidence, the Court permitted the affidavit to be substituted, to which the defendants excepted.

J. COCHRAN, for the motion, cited 7th Porter, 45.

ORMOND, J.—The question presented in this cause, is novel in this Court. The power of the Court to substitute copies of

papers belonging to the cause, and which have been lost, or abstracted from the files, is undoubted, and is a power inherent in all Courts; nor can there be any doubt whatever of the power of the Court, to substitute the affidavit alledged to be lost, upon proof of its loss, and its contents. The difficulty in this case, arises from the fact, that the proof is made by interested witnesses, the sureties in the attachment bond.

Parties to the suit, are admitted as witnesses to prove any collateral matter, which arises in the progress of the cause, which does not involve the matter in controversy, and which is addressed to the Court, and not to the jury. The proof of the loss of a written instrument, so as to let in secondary evidence of its contents, is a familiar example, of the exercise of this power.

The difficulty which has been felt in this case is, that the parties were permitted to prove, not only the loss of the affidavit, but its contents. But we think that this comes within the general rule, as the party interested, would frequently be the only person who could prove the contents. Nor can we perceive any injury likely to follow from the adoption of such a practice, as the application could always be confronted with counter affidavits.

We think, therefore, that when the application is collateral to the main question, where it is merely auxiliary to the suit, addressing itself to the Court, and not to the jury; having no tendency, either to prove, or disprove, the matter in controversy, but relating to the preparation of the suit for trial, the parties to the record are competent witnesses.

Considering these witnesses as competent, there can be no doubt of the correctness of the decision of the Court. They swear positively, that the affidavit was made, before the attachment issued, and this positive proof must outweigh the negative testimony, introduced on the other side.

It results from this examination, that the decision of the Court was correct, and the application for a mandamus must be rejected.

COLLIER, C. J.—The sureties of the plaintiff in the attachment, were interested to prove, that such an affidavit as the statute requires, was made; and, in my opinion, their testimony to establish that fact, should not have been received.

TEAGUE v. WILLIAMS.

1. A witness in an action of slander, is not permitted to make out the plaintiff's case by proving words merely equivalent in his estimation, to those he heard the defendant use; but he must state the language that was employed by the defendant according to the best of his recollection, that it may appear that the cause of action alledged, is supported by the proof.
2. Where in an action for defamatory words the defendant pleads the statute of limitations, the *onus* lies upon the plaintiff of proving that the words charged, or some of them that were actionable, were uttered within twelve months preceeding the commencement of the suit. It is not indispensable to the admission of evidence upon such an issue, for the witness to state the precise time within that period when the words were spoken, but the defendant may make his examination searching and minute upon the point.
3. The proof was, that the defendant had charged the plaintiff with swearing to a lie, before one H., a justice of the peace, of B., in a cause pending before that justice, in which the present defendant was plaintiff, and A. S. defendant; in the declaration the names of the parties to the suit, were transposed: *Held*, if the declaration referred to, and was intended to indicate the case which the witness had in view, the variance between the allegation and proof was not fatal.
4. Where the declaration charges the speaking of many slanderous words, it is competent for the plaintiff to prove that the defendant spoke some of the words charged, more than twelve months before suit brought, whether actionable in themselves, or not, for the purpose *only*, of showing *quo animo* the slanderous words proved to have been spoken within the twelve months, were uttered; and this although the statute of limitations is pleaded.
5. Where the Court rejects evidence of defamatory words, offered by the plaintiff, the defendant should not be allowed to adduce proof, that the words thus rejected were true.
6. It is competent for the defendant to prove slanderous words, such as are charged in the declaration, having been uttered by the defendant since the commencement of the action, for the purpose *only*, of showing *quo animo* the words charged were spoken.

Writ of error to the Circuit Court of Benton.

THIS was an action on the case, at the suit of the plaintiff in error, in which the defendant is charged with having spoken of, and concerning him, certain slanderous and defamatory words. The cause was tried on issues joined, upon the pleas

of not guilty, and the statute of limitations. On the trial, the plaintiff excepted to the ruling of the Court. It is shown, by the bill of exceptions, that the plaintiff introduced a witness, who testified, that the defendant had used the slanderous words charged in the declaration, during every year, and several times in each year, from 1840 up to the trial. The Court directed the witness to confine his evidence, of the speaking of the words, by the defendant, to the period within twelve months preceding the 5th of August, 1842, (the day on which the action commenced;) *and further*, if he could not specifically state the language used by the defendant, and the time when, within the period defined by the Court, without reference to what was previously, or subsequently said by the defendant, his testimony could not be received. The "witness not being able to discriminate, by using the specific words, within that period, his testimony was ruled out, &c."

It was proved by another witness, that the defendant had charged the plaintiff with swearing to a lie, before one Hannah, a justice of the peace of Benton, in a cause pending before that justice, wherein, the present defendant was plaintiff, and A. Simpson, defendant. The Court charged the jury, that if the plaintiff, in describing the suit in his declaration transposed the names of the parties, by making Simpson the plaintiff, instead of the defendant, such a misdescription, was a fatal variance, although it was intended to indicate the case to which the witness referred; and, although the plaintiff, in framing his declaration, and the defendant, in uttering the slanderous words, had the same case in view.

The plaintiff also offered testimony showing, that at the trial before the justice, which was more than twelve months previous to the commencement of this action, the defendant spoke of, and concerning the plaintiff, some of the words charged in the declaration to have been uttered; this testimony was rejected, but the defendant was permitted to adduce evidence, tending to show the truth of such words, to repel the inference of malice.

In the progress of the trial, the plaintiff offered to introduce evidence of slanderous words, such as are charged in the declaration, having been uttered by the defendant, since the institution of this action, for the purpose of aggravating the damages;

but the Court refused to admit such evidence, and it was consequently rejected.

The jury returned a verdict for the defendant, and judgment was rendered accordingly.

W. B. Martin, for the plaintiff in error, made the following points: 1. Although the statute of limitations, applying to a case like the present, is twelve months, yet it was irregular, to reject the evidence of the plaintiff's witness, because he could not state the *identical* words which the defendant uttered of the plaintiff, or the particular day within the twelve months, preceding the commencement of the suit. 2. The plaintiff was authorized to give evidence of words spoken, not only before, but subsequent to the institution of the action, for the purpose of showing the *quo animo*, and thus aggravating the damages. [4 Phil. Ev. 246; 1 Camp. Rep. 49; 2 Id. 72; 2 Stark. Rep. 93.] 3. The transposition of the names of the parties, to the suit tried before the justice of the peace, was not such a fatal variance as warranted the rejection of evidence of the suit. [4 Phil. Ev. 236; Id. 253, note 450.] 4. In respect to the admission of evidence, by the defendant, to prove the truth of words uttered by him, it is enough to say that there was no plea of justification, and it should therefore have been rejected. [4 Phil. Ev. 449, 450.]

S. F. Rice, and T. A. Walker, for the defendant in error, insisted, that as the statute of limitations was pleaded, the plaintiff could not give evidence of words spoken, more than twelve months before the suit brought. Such evidence was inadmissible, even in aggravation of damages; otherwise the statute would be defeated in its effect, and the plaintiff recover for a cause of action, for which the remedy was barred. Words spoken after suit brought do not authorize a recovery, nor can they be proved for the purpose of increasing the damages. [4 Porter's Rep. 17.] *Besides*, it does not appear that the plaintiff proved any actionable words spoken, within twelve months before suit brought, and as the plaintiff did not entitle himself to recover, by proof, there could be no evidence, for the purpose merely of increasing the damages.

The ruling of the Circuit Court, in respect to the transposition of the names of the parties, in the suit before the justice of

the peace, was clearly correct. The proof did not sustain the allegation, but was materially variant.

It may have been, that the false swearing, by the plaintiff, before the justice of the peace, was not upon a material point, and therefore not perjury; if so, the defendant might have proved the truth of what he charged, without pleading a justification, when such proof was offered, for the purpose of showing, that he was not influenced by malice. The particular words, which defendant was permitted to prove to be true, do not appear. It may have been some of the words which were not actionable, and by showing the truth of which the plaintiff could not have been prejudiced. [1 Stew. Rep. 42.] If the plaintiff was permitted to show words not actionable, the defendant might oppose such proof by evidence of a want of malice on his part. [9 Porter's Rep. 195.] The improper testimony adduced by the plaintiff, may have induced the admission of evidence by the defendant, which would have been otherwise irregular. [See 6 Porter's Rep. 90; Bates v. Allen & Ryland, at the last term; 2 Pick. Rep. 310.]

COLLIER, C. J.—It was formerly held, that unless the plaintiff, in an action of slander, proved the identical words laid in the declaration, he failed to support his action; but this strictness, it is said, has been long since relaxed, and it is now sufficient, if the plaintiff proves, that the defendant spoke words *substantially* the same as those stated in the declaration. [Kennedy v. Lowry, 1 Binn. Rep. 393; Miller v. Miller, 8 Johns. Rep. 74; Grubbs v. Kyzer, 2 McC. Rep. 305; Bell v. Bugg, 4 Munf. Rep. 260.] But, although it be allowed for the plaintiff to prove words which import the same thing in substance as those, which the defendant is charged with having uttered, yet the witnesses must state, (either positively, or as near as memory will allow,) the words they heard used, and cannot be allowed to state the impression produced upon their minds, by the whole of the conversation. [Harrison v. Bevington, 8 C. & P. Rep. 708; Ney v. Otis, 8 Mass. Rep. 122; 2 Stark. Ev. 846; Fox v. Vanderbeck, 5 Cow. Rep. 513; Olmstead v. Miller, 1 Wend. Rep. 506; 4 Phil. Ev. C. & H.'s ed. 235-6; Id. note, 450; Williams and Wife v. Bryant and Wife, 4 Ala. Rep. 44; Armitage v. Danster, 4 Doug. Rep. 291.]

Thus we see that a witness is not permitted to make out the plaintiff's case by proving words merely equivalent, *in his estimation*, to those he heard the defendant use; but he must state the language that was employed, according to the best of his recollection, so that it may appear to the Court whether the cause of action alledged is supported. This much it was proper to require of the witness, and as the statute of limitations was interposed, the *onus* lay upon the plaintiff of proving that the words charged, or some of them, that were actionable, were uttered within twelve months preceding the commencement of the suit. But the witness should not have been required, as a condition of the admission of his evidence, to state the precise time within that period, when the words were spoken. This requisition, we understand from the bill of exceptions, was made in the present case. It would have been competent for the defendant to have made the examination, upon this point, as searching and minute as could have been desired; but if the witness was prepared to express the confident belief, that the facts alledged, occurred within the time to which the bar of the statute dates back, his testimony should have been admitted.

2. The transposition of the names of the parties to the suit, as a witness in which, the plaintiff was charged with having sworn falsely, is not such a variance as should have excluded the evidence. The charge alledged to have been made, was, substantially, that the plaintiff was examined as a witness in a case between those parties, which had been pending before the justice of the peace, and that, on such examination, he had sworn falsely. This allegation is substantially proved, although the relative position of the parties towards each other, is different from the statement in the declaration.

In Wiley v. Campbell, 5 Monr. Rep. 560, it was held, that an allegation, that the defendant charged the plaintiff with having sworn a lie, in a suit of B. and wife v. Campbell's heirs, will be supported by proof that the charge was made in reference to a deposition taken to support a cross bill, filed by the husband of one of the heirs, against B. and wife, and the defendant. This is a pertinent authority upon the point before us.

3. In Russell v. Macquister, 1 Camp. Rep. 49, evidence of actionable words, spoken after the time of those laid in the

declaration, was objected to, on the ground that if such words were taken into consideration by the jury, the defendant might be made to pay a double compensation for the same injury; since another action might be brought for the words last spoken. And the distinction was taken between that case and words not actionable. But Lord Ellenborough overruled the objection, observing, that though such a distinction had once prevailed, it was not founded in principle; and that, although no evidence can be given of any special damage, not laid in the declaration, yet any words, or any acts of the denfendant, are admissible, to show *quo animo*, he spoke the words which are the subject of the action. But in such case, it is said, that the judge should direct the jury to give damages only for the words which are the subject of the action. [3 Step. N. P. 2577.] But in Defries v. Davis, 7 Car. & P. Rep. 112, it was held, that evidence of the repetition of the same words, or of other words which show an *animus*, not by separate slander, but by repetition of the slander complained of, or by other words, which show the same train of thought, was admissible; but it is not allowable to show any thing that would be the subject of another action. Any thing that shows a continuance of rankling malice, on the part of the defendant, may be received.

In Wallace v. Mease, 3 Binney's Rep. 550, it was remarked, by Chief Justice Tilghman, that there was no discernable difference between words actionable, and not actionable, or between words spoken before, or after suit brought. "The subsequent words," says he, "are received as evidence, only to show the mind and intent of the defendant, when he spoke the words which are the cause of action; and the damages are, or ought to be given, solely on account of the words laid in the declaration. This should be explained to the jury, by the judge who tried the cause; and if they do their duty, they will give no damages for any words, but those in the declaration." Again, "I confess there is danger, that in fact the jury may not confine themselves to their true line of duty, and for that and other reasons I have given before, if I considered myself at liberty, I would reject all evidence of this nature. But, holding myself bound by former decisions, I must say, that the evidence in this case was properly admitted." So where words spoken

are actionable, it is proper to admit evidence of the same words being spoken after the action brought, to aggravate damages. [Kean v. McLaughlin, 1 Serg. & R. Rep. 469.] Words spoken more than two years before suit brought, may be given in evidence, to show malice. [Mapes v. Weeks, 4 Wend. Rep. 659.] To show *quo animo* the words charged were spoken, evidence of the defendant's conversations, relating to the original defamation, had subsequent to the commencement of the suit, are admissible. [Kennedy v. Gifford, 19 Wend. Rep. 296.]

It very clearly appears, from these citations, that it was competent for the plaintiff to adduce evidence to show, that the defendant spoke of the plaintiff, some of the words charged in the declaration, more than twelve months before the commencement of this suit; whether these words were actionable previous to the bar of the statute, is wholly immaterial. In estimating the damages, the jury should not have considered them, but they should have been regarded for no other purpose than to show, *quo animo* the slanderous words proved to have been spoken within the twelve months, were uttered. This testimony being rejected, we think the Court should not have permitted the defendant to introduce proof to show its truth, for the purpose of repelling the inference of malice; and how such evidence could be presented to the jury, without admitting that offered by the plaintiff, we are at a loss to perceive.

So the Court should have permitted the plaintiff to give evidence of slanderous words, such as are charged in the declaration, having been uttered by the defendant since the institution of the suit, for the purpose of showing *quo animo* the words charged were spoken. The law was thus ruled in Defries v. Davis, and Wallace v. Mease, cited above.

It results from what has been said, that the Circuit Court erred in the adjudication of several of the points reserved by the bill of exceptions. This is too obvious to require a more particular application of the questions considered, to the facts in the record; and without adding more, the judgment is reversed and the cause remanded.

J. W. & C. CARTER v. MANNINGS & JACKSON.

1. Where a claimant makes title to a slave through a deed, it should, if proved, be left to a jury, although the title of the other party may have been complete by adverse, or other possession, or because the deed itself is inoperative, by the omission to record it. These are matters of instruction to the jury, not of exclusion from it.
2. If there is reason to believe that one paper has been substituted for another, in a deposition, the proper motion is to suppress the deposition.

Writ of error to the Circuit Court of Blount.

CLAIM interposed, under the statute, by John W. and Charles Carter, to a slave levied on by virtue of a *fi. fa.*, at the suit of Mannings & Jackson against Thomas M. Carter.

At the trial the claimants offered to read a deed of gift, executed to them in July, 1820, by one John Ward, for slaves, one being the mother of that levied upon. This deed was attached to the deposition of Martin B. Ward, who, from the deed, appears to be a subscribing witness to it, and who testified, that he was so, and that it was executed and delivered at the time it bears date, by the donor, who then was in possession of the slaves named in it, and was their owner. The deed recites, that the slaves named, had previously been leased by the donor to Thomas M. Carter, and also that they were delivered to him and his wife for the use and benefit of the donees, subject to a limitation that if both died, before attaining twenty-one years of age, the slaves were to remain the property of the donor, or of his devisees, if he made a will, and of his heirs, if he did not.

This deposition was taken by consent of the plaintiffs attorney, and the following agreement made: "I waive all objections to the within deposition of Martin B. Ward, and agree that it may be read as evidence in the case, (stating it,) upon the trial of the right of property."

The plaintiffs objected to the reading of the deed to the jury, and the Court sustained the objection, on the ground that if the deed and deposition were read according to the agreement, the deed would not be allowed to go to the jury. Both were excluded from the jury. Whereupon the claimants excepted, and this exclusion is now assigned as error.

MUDD, for the plaintiffs in error, cited Sewall v. Glidden, 1 Ala. Rep. N. S. 52; Thomas v. Wallace, 5 Id. 268.

No counsel appeared for the defendants in error.

GOLDTHWAITE, J.—We are not sure that the bill of exceptions discloses the precise ground upon which the deed, under which the claimants attempted to make title to the slave in controversy, was excluded from the jury. Be this as it may, we are concluded by it, and must consider the matter as it is stated in the transcript.

1. If the title of the debtor to the slave, had been complete in consequence of any adverse, or other possession, this should have been left to the jury under instructions from the Court. So too, if the deed excluded from the jury was inoperative, by reason of any omission to record it, here, or elsewhere, this was the proper basis for specific instructions, but does not warrant the exclusion.

2. In the condition in which the case is now presented, we forbear any expression of opinion upon the merits of the claimants's title, as that may be fully examined when the case is again tried, and content ourselves with remarking, that if the identity of the deed proved, with that produced, was the question upon which it was rejected, that is concluded by the bill of exceptions, in which the evidence of the subscribing witness is stated, as referring to a deed attached. Indeed in most cases, if there is reason to suppose a fraud is attempted in substituting one paper for another in a deposition, the proper remedy would be to suppress it.

Judgment reversed and cause remanded.

HEMPHILL v. TOWNSEND.

1. The length of notice to produce a paper in evidence, depends upon the circumstances of the case; but if the paper is in possession of the party, in Court, one day's notice, or a much shorter time, would be sufficient.
2. When the deposition of a witness is taken to prove the contents of a deed, it is not necessary to give notice to produce the deed, when the deposition is taken, but such notice must be given, before the deposition can be read upon the trial.
3. The wife of the defendant in execution, is a competent witness for the claimant, upon a trial of right of property.

Error to the Circuit Court of Benton.

This was a trial of right of property, the plaintiff in error being plaintiff in execution, and the defendant claimant.

Upon the trial of the cause, the plaintiff introduced a deposition conducing to show, that the claimant had once been possessed of the two slaves levied on, and that upon the marriage of his daughter, with the defendant in execution, they had been sent home with the new married couple. That a year or two after the marriage, complainant had made a deed, conveying to a third person, the slaves for the use of the daughter. This testimony, in relation to the contents of the deed, the Court excluded, because it was not shown that notice had been given to the claimant, to produce the deed, when the deposition was taken; although it was admitted, he had received one day's notice to produce it on the trial, and that it was in his possession. To the exclusion of the testimony the plaintiff excepted.

The claimant also read the deposition of his daughter, the wife of the defendant, though objected to by the plaintiff, and to which he also excepted. All of which he now assigns for error.

W. B. Martin, for plaintiff in error, cited 3 Wend. 296; 7 Cowen, 739; 6 Greenl. Ev. 200-6.

W. P. Chilton and S. F. Rice, contra. There was no proof that the deed was ever delivered by the claimant, so as to be operative against him. As to the sufficiency of the notice to produce the deed, they contended, it was in the discretion of the primary Court.

That the wife of the defendant was a competent witness, they cited 1 S. & P. 449; 5 Id. 426; 2 Porter, 389; 4 Id. 63; 5 Ala. Rep. 771.

ORMOND, J.—The object of giving notice, to produce a paper in the possession of the opposite party, is to enable him, by producing it, to prevent the necessity of his submitting to secondary evidence of its contents. The length of the notice, must, therefore, depend on the circumstances of the case; but if it be shown that the paper is in the possession of the party, in Court, one day's notice, or even a much shorter time, has been considered sufficient. [Utica Ins. Co. v. Caldwell, 3 Wend. 296.] We do not entertain a doubt that the notice in this case, was ample. The claimant, it appears, was present, and in possession of the deed, and if he did not think proper to produce it, should have been required to submit to secondary evidence of its contents.

There was no necessity for giving notice to produce the deed, when the deposition of the witness was taken. If it had been there produced and shown to the witness, it would not have superseded the necessity of giving notice at the trial, to produce it, before reading the deposition of the witness, proving its contents. As the claimant was under no obligation to produce it at the trial, it was necessary for the plaintiff to be prepared with evidence of its contents, if not produced on notice.

There is nothing in the objection, that the deed was not shown to have been delivered, as the plaintiff was not permitted to prove any thing relating to it; but in point of fact, it appears to have been delivered, as it was for a considerable time in the possession of the witness.

As the defendant in execution was a competent witness, it follows that his wife was also. He is admitted upon the principle, that his interest in the question is balanced; and that although he may be presumed to have a leaning in favor of the claimant, it goes to his credibility, and not to his competency. By the same process of reasoning, the competency of the wife is shown, as her interest is indentical with his.

For the error of the Court, in excluding the deposition of the witness, the judgment must be reversed, and the cause remanded.

PERKINS' EXR'S, ET AL. v. WINTER'S ADM'RX, HEIRS, ET AL.

1. A decree was rendered for the sale of the real estate of an intestate, upon a petition by the administratrix, that the same could not be *fairly, equally and beneficially divided among the heirs;* it was objected in a collateral suit that it did not appear from the record, that the guardian of the infant children of the intestate answered the petition; that the testimony was taken by the petitioner without notice to the heirs; that a deed was directed to be made to the purchaser under the decree, although the purchase money was not paid; that the infant heirs of the intestate had no notice of the proceedings in the Orphans' Court; and that the publication was made without an order of Court, although the fact of non-residence was not verified by the oath of the administratrix: *Held*, that although these objections might be sustained by the record, they do not show a want of jurisdiction in the Orphans' Court, or establish the nullity of its decree, but are mere irregularities, for which a revising Court might reverse, without affecting the purchaser's title.
2. The Orphans' Court may take jurisdiction and order the sale of the real estate of a deceased person, although the decedent had executed a mortgage thereon, which was undischarged; and the purchaser at such sale, will become invested with the title of the heirs of the mortgagor.
3. Where lands are sold *by the quarter section, according to the survey under the authority of the Federal Government, at so much an acre*, and bonds are given for the payment of the purchase money, the purchaser cannot claim a deduction for a deficiency in the quantity of the land—there being no fraudulent concealment or misrepresentation, by the vendor, or any one representing him, or authorized to act in the matter.
4. Where lands are sold by commissioners, under an order of the Orphans' Court, the sale confirmed, the commissioners *ordered* to make a "conveyance by deed" to the purchaser, and bonds for the payment of the purchase money executed by the latter, the rule of *caveat emptor* applies, and the purchaser can claim no indemnity, for any incumbrance that may rest on the title.
5. Commissioners appointed by the Orphans' Court to sell land, and ordered to execute a deed to the purchaser, are in no default if they do not look him up, and tender a conveyance. It is enough if they deliver to the purchaser a deed on demand. *Semble:* If the commissioners refused to execute the order of the Orphans' Court, that Court might cause a conveyance to be made, or, if its powers are inadequate, Chancery could lend its aid.

Appeal from the Court of Chancery sitting for the County of Lauderdale.

The plaintiffs in error filed their bill, stating, that in the year 1835, Wm. O. Perkins, the testator, purchased two quarter sections of land, situate in the county of Franklin, for the sum of eight thousand and one dollars and sixty cents, and executed bonds, with sureties, for the payment thereof, at one and two years. These lands were sold as part of the estate of Wm. H. Winter, deceased, by commissioners, appointed under an order of the Orphans' Court of Franklin, upon the petition of the administratrix, representing that the same could not be fairly, equally and beneficially divided among the heirs, owing to their number, and the location of the lands.

It is further alledged, that the testator acquired no title by his purchase: 1. Because the lands were mortgaged previous thereto, for the sum of either $108,000 or $4,000, according as the mortgage may be construed; and this incumbrance is in full force. 2. Because the proceedings in the Orphans' Court were irregular and incomplete. In addition to this, it is stated, that the quarter sections of land are deficient in quantity, about fifty acres.

It is admitted that the testator took possession of the lands in question, and occupied them up to the time of his death; an event which occurred in the year 1840; that while he was ignorant of the defectiveness of his title, he paid one thousand dollars on the first note that matured; and it was only some short time previous to his death, that he was informed of the mortgage on the lands. He then refused to pay any thing more on his notes; but his health and habits being such as disqualified him for business, he took no steps to rescind the contract.

A suit was brought on both notes in the year 1843, in the County Court of Lauderdale, against the executors of Perkins, in the name of the commissioners, for the use of Winter's administratrix; and in February, 1842, a judgment was recovered for the balance due on the notes, with interest. The executors attempted to resist a recovery, upon the ground that the title did not vest in their testator, by his purchase, &c., but their defence was adjudged inadmissible at law. The bill prayed an injunction to restrain the collection of the judgment, and that process of *subpœna* may issue.

The administratrix of Wm. H. Winter, deceased, in her an-

swer, affirms, that the proceedings in the Orphans' Court of Franklin were regular; admits that the lands were incumbered by a deed of trust for $4,000, and no more, and insists that the testator was informed, at the time of his purchase, of its existence; as it was duly registered in the County Court. If he was not advised of it at that time, he received such information before he paid any part of the purchase money, and afterwards made the payment of one thousand dollars, and promised to pay the residue, and continued in possession as long as he lived; and his executors have occupied and cultivated the lands, ever since that event. She admits that the testator may sometimes have got drunk, but denies that his intemperance was such, as to have prevented him from litigating the matters stated in the complainant's bill, had he been so inclined.

She submits to the Court, whether the deed of trust is a valid incumbrance, for even $4,000 and interest, and alledges, that the interest thereon was paid up to November, 1839, by the President and Directors of the Tuscumbia, Courtland and Decatur Rail Road Company. She insists that the deed of trust, if available for any purpose, can only be resorted to by the *cestui que trust*, as a security, after the stock of her intestate in that corporation, shall have been disposed of, in order to extinguish the debt intended to be secured; and further states, that the stock of her intestate in the company was sold, publicly, as a part of his estate, before the time of the sale of the lands in question, and the same was purchased by Messrs. Walker, Wallace & Sons, with the agreement, publicly announced, that the purchaser should discharge whatever incumbrance, if any, existed on the lands, by virtue of the deed of trust. It is also insisted that the charter requires that the funds of the company should be exhausted before any lien, such as that in question can be insisted on.

The respondent further states, that Isaac H. Walker, of the firm of Walker, Wallace & Sons, did execute to the company a deed of trust, in substitution of that executed by her intestate, which was accepted by the company, and was offered, as she is informed to the *cestui que trust*, and was such as he was bound to accept, and in equity was a discharge of that now set up by the complainants. This latter deed bears date he 6th day of November, 1838, and conveys certain tracts

of land and town lots, valued at five thousand, five hundred dollars, situate in the county of Franklin, is made upon the same trusts and conditions as the deed executed by the intestate, and is a substitute for it; is executed by the President of the Rail Road Company, and was registered in the office of the clerk of the County Court, upon the acknowledgment of the parties who executed the same.

She insists that the commissioners sold the land, according to the government surveys, without any warranty of quantity, and that the estate of her intestate is not chargeable for a deficiency—whether the subdivisions contain more than the surveys indicate, she cannot say. *Further*, that the proceedings in the Orphans' Court, were regular and sufficient, and that a deed was made by the commissioners, (in due form,) for the testator, which would have been handed to him on demand; and she now brings it into Court as an exhibit with her answer.

Respondent further objects to a rescission of the contract, because the estate of her intestate has been almost entirely distributed, and the interest in the notes in question, vested in his infant children, who would find it difficult, even if practicable, to recover their proportions of the estate from other distributees: and for the additional reason, that the testator, and his executors, have used the lands in a ruinous and wasteful manner, removing, pulling down, or destroying, a valuable dwelling house, out-houses, granaries, gin-house, &c. The value of these, including injury to land, are not less than twenty-five hundred, or three thousand dollars; besides all this, the timber has been used about the land, and on the adjoining lands of the testator, so as still further to depreciate its value.

If the contract shall be annulled, respondent insists that the testator's estate should be held accountable for the rents, and the injury to the land, loss of timber, &c., and that to the value of these the injunction should be dissolved. The respondent insists upon the benefit of a demurrer, in her answer.

The answer of Isaac H. Walker and wife, is substantially the same as that of Winter's administratrix; in addition, they state, that the former, as the agent of the administratrix, proposed to the testator, Perkins, (long after his purchase,) to have an accurate survey made of the lands, and a day was designated for that purpose, but the testator did not meet the respon-

dent according to appointment. This, the administratrix agreed to do, in deference to the testator's objection, and from a willingness to receive pay for so much only, as was contained in the tracts purchased, though then, as now, she believed he was bound to pay for the number of acres ascertained by the government survey.

These respondents further answer, that the substituted security, was accepted by the Rail Road Company, in lieu of the deed of trust executed by the testator. Delafield, the *cestui que trust*, was informed of it, and did not object to the value of the property embraced, but stated that the holders of the company bonds, did not wish any change in the security. They insist, if the lien of the first security is still continuing, it can only be for fifty cents in the dollar, (the present value of the bonds,) with interest, at seven per cent.

Richard H. Winter, in his answer, states the same facts as do his co-defendants, and insists that the omission to plead to the action at law, that the lands were deficient in quantity, leaves the complainant remediless as to that point: Further, that as the complainants set forth in their pleas, the other grounds of relief now relied on, to which the plaintiff in the action filed a replication, and a judgment was rendered, on verdict, in favor of the plaintiff, they cannot be allowed to litigate again the same matters.

The answer of John Delafield denies that the deed of trust executed by the intestate, has been substituted by any other security, and insists that it is not only charged with four thousand, but with one hundred and eight thousand dollars.

The bill was answered by the other defendants, but as they do not materially vary the case made by the answers recited, they need not be noticed. On motion of the defendants, founded on their answers, the injunction was dissolved, at the complainants costs. The Chancellor was of opinion—1. That the proceedings of the Orphans' Court were regular, and if defective, its decree could not be collaterally impeached, as its jurisdiction over the subject matter was unquestionable. 2. The Orphans' Court could order the sale of any interest in lands, of which a person died possessed; whether a fee simple, or a less estate; that such sale merely passed the decedent's interest, without any warranty; consequently, the purchaser takes the

title, for better, for worse, and if it is defective, he can have no redress. 3. The bill contains no charge of fraud, as it respects the sale, unless it be the failure to give notice of the deed of trust; and the facts disclosed, show, that there is no ground for such an imputation.

J. W. McClung and S. Parsons, for the plaintiff in error, insisted, that the proceedings in the Orphans' Court were irregular, (Clay's Digest, 224, §§ 16, 17, 18, 19, 21,) for the following reasons: 1. The guardian of the infant children of the intestate, did not answer the petition. 2. The testimony was taken without notice to the heirs. 3. A conveyance was ordered, without payment of the purchase money. 4. Publication was made without an order of Court, although the fact of nonresidence was not affirmed by the oath of the administratrix. 5. The infant heirs had no notice of the proceedings in the Orphans' Court.

If the Orphans' Court proceeded irregularly, the infant heirs may take advantage of it, and are entitled to a day for that purpose, after attaining their majority. [Sugden's Vend. 130, 446; 1 Dess. Rep. 125; 4 Bibb's Rep. 11; 2 Plow. Rep. 402; 2 Atk. Rep. 531, 403, and note; 1 Plow. Rep. 503; 3 Id. 352.]

The injunction should not have been dissolved without first ascertaining, that the sale of the lands was for the benefit of the infant heirs.

The lands were mortgaged by the intestate; the Orphans' Court had no jurisdiction over the mortgagee, and of the matters of account between him and the mortgagor, and consequently, could not decree a sale. That Court can only act upon a legal title, which is unincumbered.

But the ground of equity mainly relied on, is, that after the purchase, by Perkins, he discovered that there was a subsisting lien on the land. [Story's Eq. §§ 122-3, 134, 140-1-2-3.] Without a warranty, or other stipulation, a purchaser has the right to insist on a good title, and if incumbered, before the contract is executed, the vendor must discharge it. The rule, *caveat emptor*, does not apply till the deed is executed and accepted. [4 Ala, Rep. 28-9; Sugden's Vendors, 345-7.] The fact of the vendee's taking possession, promising to pay, and giving further time to make title, will not prevent him from in-

joining a judgment at law, for the purchase money. [3 Russell's Rep. 320.] A purchaser is not obliged to accept a title that cannot be adjusted without litigation. [4 Russ. Rep. 374; 6 Call's Rep. 308; 1 Dess. Rep. 382; 3 Bibb's Rep. 317; 4 Johns. Ch. Rep. 669.]

The fact of selling, is an implied affirmation on the part of the vendor, that he can perform what he undertakes, viz: to make a title, and until a conveyance is made and accepted, the vendee may, in equity, insist upon the defectiveness of the vendor's title, as a reason why he should not be compelled to pay the purchase money. And the fact that the sale was made under an order and decree of a Court, will make no difference. [1 Brock. Rep. 228; 2 Id. 250; 4 Bibb's Rep. 635; 7 Paige's Rep. 556; 8 Paige's Rep. 12.]

It has been held, that after acquired lands do not pass by will, and a decree of the Orphans' Court, directing the sale of such land pursuant to the will, is a nullity. [2 Ala. Rep. 712.] So a sale of land by execution, on a decree obtained without an appearance, or service of process, passes no title. [4 Mon. Rep. 544.] In the case last cited, the Chancellor thought that the purchaser took the title for better for worse; but this it is insisted is not the law, and in a proper case a Court of Equity may rescind. [Sugden on Vendors, 45; 1 P. Wms. Rep. 745.]

It is not shown that Perkins intended to waive the defect of title. The answer of one of the defendants shows that he paid the $1,000, because he had the use of the lands. In addition, it may be said that he retained enough in his hands to discharge the lien, and he was entitled in equity to have it thus applied. [1 Ves. Rep. 266; 3 Sim. Rep. 29; 1 Russ. & M. Rep. 296.] But the fact of waiver must depend upon the evidence, and is not concluded by the answers.

Until the master's report is confirmed, and a conveyance made, the sale is considered incomplete, and liable to be set aside, at the instance of either party. And a defective, or incumbered title, will induce the Court of Equity to interfere, at the vendee's instance. [2 Paige's Rep. 64; Sugden's Vendors, 36, 37, 38, n. 41; 11 Ves. Rep. 559; 13 Ves. Rep. 518.]

The registration of the deed of trust, was no notice to Perkins, as he did not claim as a creditor of Winter, or a purchaser with an interest adverse to the *cestui que trust*. [6 Johns.

Ch. Rep. 428; Sugden's Vendors, last ed. top page, 251-2; 3 Atk. Rep. 650; 4 Dana's Rep. 260.]

Wm. Cooper, for defendants in error. If there is neither fraud nor a warranty, the purchaser of land cannot be relieved, either at law or in equity—there is no ground on which the jurisdiction of equity can attach. [3 Ala. Rep. 251; 2 Johns. Ch. Rep. 523; 5 Id. 32, 79, 82-3; 1 Id. 213-8; 5 Paige's Rep. 300-7; 1 Ball & B. Rep. 506, 538-9.] In the case of a sale by an assignee in bankruptcy, the same principle was recognized. [2 Edw. Ch. Rep. 37; 4 Mad. Rep. 364; 2 Caine's Rep. 188.]

The long continued possession of Perkins and his executors, and the distribution of the estate of Winter, should prevent a rescission of the contract. [14 Johns. Rep. 453.]

A purchaser under the decree of a Court of competent jurisdiction, must take the title as it is, and pay the purchase money, if he goes into possession. [Sugden's Vendors, chap. 4, § 3; 4 Gill and John. Rep. 479.]

A Court of Equity will not interfere to vacate a sale, made under the decree of the Orphans' Court; the latter tribunal may set it aside, if it should not be supported. [4 Gill & John. Rep. 479.] The title cannot be questioned collaterally. [1 Ala. Rep. N. S. 731-2-3-4; 12 Wend. Rep. 533.]

The continued occupancy of the land, removing or pulling down houses, cutting timber, &c., with a knowledge of the incumbrance, amount to a waiver of all objections to the title, and manifest a willingness to complete the purchase on the part of the vendee. [Sugden's Vendors, 212; 4 Brown's Ch. Rep. 494; 4 Rand. Rep. 478, 480; 3 Merivale's Rep. 64; 18 Ves. Rep. 505; 2 Monr. Rep. 18; 1 Bibb's Rep. 212; 4 Id. 103; 4 Porter's Rep. 384-5; 2 Johns. Ch. Rep. 520; 2 Brock. Rep. 210; 12 Ves. Rep. 27; 3 Swanton's Rep. 168; 4 Dess. Rep. 126; 1 Mad. Rep. 316; 1 Merivale's Rep. 52, 133; 2 Id. 492; 2 Molly's Rep. 102.]

As a general rule, a purchaser cannot be relieved in equity, unless he has a right to damages. There are exceptions to this rule, it is true, as in case of a personal disability to sue, &c. [2 McC. Rep. 158-9; 1 Fonb. Eq. book 1, ch. 3, § 1, and cases there cited.]

If the proceedings of the Orphans' Court were defective, the

defects should have been relied on at law. But the objections, if any, were merely errors, which made the decree reversible only, and not void. [3 Stew. & P. 355, 367; 1 Ala. Rep. N. S. 731-2-3-4.] A defendant should employ diligence in acquiring a knowledge of facts, to prepare for his defence at law, and if he neglects, he cannot be heard in equity. [1 Ala. Rep. N. S. 352-6; 2 Id. 21; 5 Porter's Rep. 547; 6 Id. 24; 7 Id. 552.]

Perkins was chargeable with notice of the deed of trust, which was duly registered. [1 Dana's Rep. 189; Dev. Ch. Rep. 470. If a purchaser at a sale under execution, or decree, have actual or constructive notice of defects of title, he has no remedy, (1 Cow. Rep. 622;) or if, by due diligence, he could have acquired notice, the same consequence follows. [2 Sim. & Stu. Rep. 472; 1 John. Ch. Rep. 298, 394.]

In a sale by a ministerial officer, or under an order of Court, there is no implied warranty of quantity. [1 Hill's Ch. Rep. 494.]

COLLIER, C. J.—The application for the sale of the real estate of William Winter, deceased, was regularly made by his administratrix, to the Orphans' Court of the county by which the administration was committed to her. In her petition, she describes the lands according to the surveys made by the Federal government, the town lots by their numbers, and states the names, ages, residence of the heirs, &c., and prays that the real estate may be sold, upon the allegation that it cannot be *fairly, equally and beneficially divided among them.* The Court took jurisdiction of the case, adjudged a sale, in compliance with the petition, particularly prescribing the terms, and manner thereof; and appointed five commissioners, who, or a majority of whom, were invested with authority to execute the decree.

In respect to the supposed objections to the proceedings in the Orphans' Court, we think that they are altogether untenable, in the manner in which they are presented. The act of 1822, authorizes an administrator to file a petition, in the form, and for the cause stated in the present case, and thereupon directs that a citation shall issue to the heirs, &c., and that guardians shall be appointed for such of them as are incapable of defending for themselves; that the guardians shall deny the

allegations of the petition, and where the denial is made, depositions are to be taken, as in Chancery cases. If a sale is decreed, commissioners shall be appointed in the decree, with directions to sell the estate, either for money or on a credit, as may be most just and equitable, who are to report to the Court, at the time limited therein. *Further*, upon the coming in of the report of the commissioners, the Court is required to "render a final decree in the cause; and if the terms of the sale have been complied with by the purchaser of the estate, the commissioners shall be directed by such final decree, to convey the estate sold to the purchaser." [Clay's Dig. 224-5.]

In Wyman, et al. v. Campbell, et al. 6 Porter's Rep. 219, the statute we have cited, and others of a kindred character, were largely considered. We there held, that proceedings in the Orphans' Court, in order to a sale of the realty, are *in rem*, against the estate of the decedent, and that jurisdiction attaches *quoad the thing*, where the petition is regularly filed, and recognized by the action of the Court, though the party in interest may not be notified of the pendency of the proceeding: That an order, or decree of the Orphans' Court, in a case within its jurisdiction, is as conclusive as a judgment in the ordinary course of judicial procedure; consequently it is not *void*, or collaterally impeachable, although the proceedings may discover errors, for which an appellate Court, upon a direct application, would reverse. *Further*, where a sale has been made, under an order for that purpose, if the decree is reversed for an error in the record, the defendant can only have restitution of the money, while the purchaser shall retain the property. So the failure of the administrator to execute the bond required, to entitle himself to the notes or bonds given by the purchaser, does not affect the validity of the sale; but it is necessary for the commissioners to observe every requirement previous thereto, though by any *post factum* omissions, the purchaser cannot be prejudiced. See, also, Grignon's Lessee v. Astor, et al. 2 How. Rep. (U. S.) 319.

Without stopping to inquire, whether the objections made to the proceedings in the Orphans' Court, are well founded in point of fact, it is clear that they do not show a want of jurisdiction in that tribunal, or establish the nullity of its decree.

They merely point out irregularities, for which a revising Court might reverse, without affecting the purchaser's title.

Even if it were competent for the complainants to object, that the confirmatory decree directed, that the commissioners should make a "good and sufficient conveyance by deed," to the purchasers, before the payment of the purchase money, such an objection would avail nothing; for the statute, as we have already seen, directs a final decree to be rendered upon the coming in of the report of the commissioners, and thereby to order the commissioners to convey the estate sold, to the purchaser, if he has complied with the terms of sale.

It is not pretended that the commissioners, in executing the order of sale, failed to observe any one of its requirements, but it is inferable from the bill, as well as the entire record, that they strictly pursued the authority under which they acted.

The complainants then, cannot be permitted to renounce the purchase made by the testator, and claim a rescission of the contract, because the proceedings in the Orphans' Court were not conducted with legal accuracy. The case cited, is a conclusive authority upon the point, and has been often recognized by us, as a correct exposition of the law. [Doe ex dem. Duvall's heirs v. McLoskey, 1 Ala. Rep. N. S. 708.]

It is insisted, however, that the statutes which provide for the sale of the real estate of deceased persons, do not authorize the Orphans' Court to take jurisdiction of the lands of a decedent, which are incumbered by a mortgage, or other security. The act of the legislature which has been cited, confers upon that Court the power to order a sale of the realty, whenever the facts required to exist, are established by proof. Its jurisdiction is neither expressly, nor by implication, confined to those cases in which the title is free from all opposing liens, or claims, and the generality of the terms in which the statute is phrased, will not permit us thus to restrict its application.

In Doe ex dem. Duval's heirs v. McLoskey, 1 Ala. Rep. N. S. 734, it was conceded, that the County Court could not decree the sale of the real estate of a deceased person, on which mortgages exist, and provide for their payment from the proceeds, but it was intimated that a sale of the mortgagor's interest, under an order of that Court, would confer upon the purchaser the right to redeem. Further reflection has but

tended to convince us, that the intimation there made, is well founded. A mortgagor in possession, has not only the equity of redemption, but he has a legal interest which may be sold under execution; and conceding that the Orphans' Court has no equitable jurisdiction, yet the statute cannot, by construction, be limited to cases in which the decedent had an unincumbered legal title. It is upon the *real estate*, that that Court is authorized to act, without reference to the completeness of the title. A sale under its decree, places the purchaser in the condition of the heirs of the deceased, and any remedy which they might have adopted, in order to disincumber the land, is open for him. Perhaps his situation would be more favorable than theirs, where he can be brought within the influence of the rules applicable to a *bona fide* purchaser, without notice. But this question need not now be considered.

We are now brought to inquire, whether the complainants are entitled to relief for the supposed deficiency, in the quantity of the land purchased by the testator. It has been held, that although the purchaser of a tract of land, promise to pay a certain sum *by the acre*, yet if he also agree to take it by the patent, or survey previously made, (in the absence of fraud on the part of the vendor,) he must be understood to risk the quantity; and therefore is not entitled to any compensation for deficiency. [Fleet v. Hawkins, 6 Munf. Rep. 188.] So the conveyance of a particular tract of land, without specifying quantity, does not bind the vendor to warrant a particular number of acres, if he has not falsely represented or concealed facts, within his own knowledge; although both parties may have expected, (judging from documents and other evidence,) that the number of the acres was greater, than upon a subsequent survey it appears to be. [Tucker v. Cocke, 2 Rand. Rep. 51.] In Harrison v. Talbot, 2 Dana's Rep. 261, it was determined, that where the sale of land was by the tract, or where the quantity was stated merely by way of description, Chancery could afford no relief, on the ground of mistake of quantity. So where a house and lot in town, described as containing *nearly two acres*, was advertised for sale at auction; the auctioneer stated at the sale, that there was nearly two acres, but pointed to the inclosure of the lot, as containing the land he proposed to sell; and it appeared to have been a sale in

gross. On a bill for a specific performance, at the suit of the vendor, it was decreed that the purchaser was not entitled to any abatement in price, for the deficiency; although the lot contained but one acre and twelve hundredths. [Foley v. McKeown, 4 Leigh's Rep. 627.] And if land is sold in a body, by a designated name, or by the acre, the purchaser can claim nothing for deficiency. [Hoffman v. Johnson, 1 Bland's Rep. 109. See also, Brown v. Parish, 2 Dana's Rep. 9; Stebbins v. Eddy, 4 Mason's Rep. 414; Whaley v. Eliot's heirs, 1 A. K. Marsh. Rep. 343; Jolliffe v. Hite, 1 Call's Rep. 301; Pendleton's heirs v. Stewart, 5 Call's Rep. 1; Pringle v. Samuel, 1 Litt. Rep. 44; Veeder v. Fonda, 3 Paige's Rep. 94; King v. Hamilton, 1 Peters' Rep. 311; Eubank v. Hampton, 1 Dana Rep. 343; Hampton's heirs v. Eubank, 4 J. J. Marsh. Rep. 634; Portman v. Mill, 2 Russ. Rep. 570; Moredock v. Rawlings, 3 Monr. Rep. 76; Hull v. Cunningham's Ex'r, 1 Munf. Rep. 330; Nelson v. Carrington, 4 Munf Rep. 332; Dozier v. Duffee, 1 Ala. Rep. N. S. 320; Minge v. Smith, Id. 415.]

In the case at bar, the land of which the testator was the purchaser, was sold by the quarter section, according to the survey made under the authority of the Federal government, and each quarter was supposed to contain one hundred and sixty acres—that being the proper size of such a subdivision. By bidding it off at a certain sum *per acre*, the purchaser expected to pay for so much land, as the patent from the United States to the patentee, recited to be the number of acres embraced by each quarter section. Neither party contemplated a survey in future; and if the tracts were larger than supposed, the purchaser would be entitled to the excess, or if less, he must stand by his bargain. This view of the case, as it respects the assumption of fact, is sustained by the record, and the legal conclusion, seems to us to result so clearly, from the authorities cited, as to make it unnecessary to amplify the point.

It remains but to inquire, whether the fact, that the land was incumbered by the intestate, Winter, if Perkins purchased without a knowledge of the incumbrance, entitles the representative of the latter to claim a rescission of the contract, or a deduction *pro tanto* from the purchase money.

In respect to purchases of land consummated by a deed,

Chancellor Kent says, "If there be no fraud, and no covenants taken to secure the title, the purchaser has no remedy for his money, even on a failure of title. This is the settled rule at law, and I apprehend the same rule prevails in equity. I know of no case in which this Court has relieved the purchaser, where there was no fraud and no eviction." [Abbott v. Allen, 2 Johns. Ch. Rep. 523. See, also, Clements v. Loggins, 1 Ala. Rep. N. S. 622; Younge v. Harris' Adm'r, et al. 2 Id. 108; Steele v. Kinkle and Lehr, 3 Id. 352; Cullum v. The Branch Bank at Mobile, 4 Id. 21; Caldwell v. Kirkpatrick, 6 Ala. Rep. 60; Gardner v. Kettles and another, 3 Hill's Rep. 330.]

It is argued for the defendants, that whatever rules apply to sales of land, where the proprietor is in fact the vendor, the purchaser at a judicial sale, can claim no indemnity for a defect in the title; but, as to him, the rule of *caveat emptor* is strictly applicable. In Friedly v. Scheetz, 9 Sergt. & Rawle's Rep. 156, one of the questions was, as to the effect of a sheriff's sale. The Court said, "It is a mistake, when it is supposed the sheriff sells a sound title. He sells the claim of the defendant in the execution, and no more, as free and clear an estate as the debtor held; and the rule of *caveat emptor* is binding on every purchaser at sheriff's sale. Fraud, a clear mistake in the description of the property by the sheriff, its situation, its dimensions, would raise a different question; but, even in these cases, the purchaser ought not to lie by, when he has obtained the knowledge, but should move the Court to set aside the sale, and under some circumstances, long delay after discovery, would amount to an abandonment of the objection."

In the case of the Monte Allegre, 9 Wheat. Rep. 616, the claimant filed his petition, setting forth, that at a public sale of part of the cargo of the Monte Allegre, he purchased a large quantity of tobacco, for which he paid the marshal, under whose superintendance the sale was conducted, $15,495 46. That the tobacco was sold by sound and merchantable samples, and claimant became the purchaser, under the impression that the bulk corresponded with the samples; but upon inspection, the same was found to be wholly unsound, and unmerchantable, and upon a re-sale yielded the sum of $4,818 52, and no more. That the cause in which the order was passed,

by virtue of which the tobacco was sold, was still pending in the Court; and the proceeds of the sale remained there, under its authority and control; thereupon he prayed for such relief as, upon proof of the allegations of the petition, he might be considered by the Court entitled to. It was insisted, that in judicial sales, the Court has entire control over the contract. It considers the contract as made with itself, and will interfere under equitable circumstances, to relieve the purchaser, where it would not interfere in a private contract; and this doctrine applies both in Courts of equity and admiralty. To this argument, it was answered, that admitting there had been gross fraud, or a warranty, express or implied, by the marshal, or the auctioneer, yet neither the property nor owners, were answerable to the purchaser for the consequences. That the sale was by the Court, not by the owners; the former was not even the agent of the owners *pro hac vice*, but the Court, advancing the purposes of justice, orders the property to be sold, without authorizing a warranty. This view of the respondent was sustained by the Court, who remarked, that judicial sales made by an officer, bear no analogy to sales made by agents appointed by individuals for that purpose; in the latter, the exhibition of a sample would be an implied warranty of quality, binding on the principal, but in the former, the officer is bound by the authority under which he acts, and beyond this, cannot implicate the property, nor involve the owners in responsibility. *Further*, the Court said, "It is true, that the proceeds of the Monte Allegre, and her cargo, remain in the Circuit Court, and may be subject to the order of this Court, if a proper case was made out, which, in law or equity, fixed a charge upon this fund. These proceeds are in Court, as the property of the original owners, and for distribution only. And if such owners would not be liable at law, for the loss upon the tobacco, it is not perceived, that any principle of justice or equity, will throw such loss upon their property. The principle, if well founded, cannot depend upon the contingency, whether or not the proceeds shall happen to remain in Court, until the defect in the article sold is discovered. If the proceeds are liable, they ought to be followed into the hands of the owner, after distribution; and if they cannot be reached, the remedy ought to be *in personam*."

In Brown and Brown v. Wallace and another, 4 Gill & J. Rep. 491, the Chancellor admitted, that in most instances where lands are sold under a decree in England, the Court undertakes to sell a good title, and hence the practice of referring it to a master, to report whether the title is unembarrassed. But he insisted that the law was otherwise in Maryland, and in that State the rule *caveat emptor* applied. *Further*, "The Court, in no case, undertakes to sell any thing more than the interest of the parties to the suit; and, consequently, it allows of no inquiry into the title at the instance of a purchaser, or any one else. The Court makes no warranty of any kind, of the title sold by its trustee, and therefore cannot listen to any objections as to defect of title, or be involved in any inquiry into its validity." "And it is also necessary for the same reason, that the Court sells only the right of the parties to the suit, that the purchaser should ascertain for himself, whether or not the title of those parties may not be impeached, or susperseded, by some other, and paramount title. For he has no right to call upon the Court to protect him from a title not in issue in the cause, and no way affected by the decree." See also Ridgely v. Gartrell, 3 Har. & McH. Rep. 450; Anderson v. Foulke, 2 Har. & G. Rep. 358. In the case cited from 4th Gill & Johnson, the Court of Appeals, without inquiring, whether the doctrine of *caveat emptor*, applied to sales made by the trustees of the Court, determined, that where such a trustee, at the time of sale, expressly declared, he only sold the estate, right and interest, which the parties to the decree had in certain lands, and if they had no right, he sold none, there can be no pretence of warranty. It was also held, that although the County Courts of Maryland, exercise equity jurisdiction, they cannot give to a party, injured by the trustee of the Court of Chancery, any relief, and *vice versa*.

So it has been decided in South Carolina, that the rule of *caveat emptor* applies to sheriff's sales. All, say the Court, who attend such sales, ought to take care and examine into the title, &c., and no warranty can be implied on the part of the owner, as to whom the proceeding is compulsory, nor of the sheriff, who is the mere agent of the Court, nor of the Court itself. The creditors of Thayer v. Sheriff of Charleston, 2

Bay's Rep. 170. See the practice in England in respect to sales under decrees, 2 Smith's Prac. 187 to 212.

In the present case, it appears that the Orphans' Court adjudged the lands in question to be sold, and appointed five commissioners, with authority to them, or a majority of them, to execute the decree, and report their proceedings; the commissioners accordingly sold the land, pursuant to their authority, reported the fact to the Court, together with the name of the purchaser, the price, security given, &c. Thereupon it was ordered, that the commissioners make to the purchaser, a good and sufficient conveyance, by deed. Conceding, that where a person appoints another his agent, to sell property, the right to warrant its title and quality, is embraced in the power to sell, and, unless restricted, it is a necessary consequence of it, yet the same rule it is conceived does not apply to agents appointed by the Court for executing its order of sale. The nature of the power, the occasion of conferring it, and the authorities cited to the point, clearly show, that such is the law.

Here the commissioners were the agents of the Court, to execute its decree, so that, in legal effect, the sale was made by the Court itself. If the decree was irregularly executed, or there was a sufficient reason for relieving the purchaser, because the title was incumbered, or otherwise defective, the proper course of the purchaser was to except to the report, if he acquired a knowledge of the defects previous to confirmation. We will not say that a purchaser may not afterwards go into equity upon any state of facts, but we think, that to entitle him to be there heard, he should show, that he employed proper diligence to inform himself of the condition of the title, before the report was definitively acted on. It is not pretended, in the case before us, that the commissioners were informed of the incumbrance upon the land, that they used any means calculated to prevent inquiry, or that the testator attempted to ascertain whether he was purchasing a clear title.

The confirmatory order of the Orphans' Court, was its final action in the case before it. It required the commissioners to make a "conveyance by deed," to the purchaser. But in order to perform this duty, they were under no obligation to follow after him—it was enough, if they delivered to the purchaser a deed on demand. The bill does not alledge that it was

ever requested, and it cannot be intended that the commissioners are in default. If it had been shown to the Orphans' Court that they refused to execute its order, that Court, perhaps, might have caused a deed to be made, or, if its powers were inadequate, Chancery could have lent its aid.

It is sufficiently shown by the bill, that the purchaser executed his notes with surety, for the payment of the purchase money, that he went into possession, and continued to occupy the lands for at least five years, and up to the time of his death; and that his executors still possess and cultivate them. His possession for so long a time, and even after he was informed of the incumbrance, to say nothing of the occupancy of the executors, unexplained, furnish strong reasons (if there were no others,) against the repudiation of the purchase; but there is another ground, still more potent, as we have already seen, which is a bar to the relief sought.

If a deed had been executed, we apprehend it would not have been contended, that the purchaser could have claimed a rescission of the contract, or deduction from the purchase money, to the extent of the incumbrance. The omission to execute the deed, (especially when not demanded,) should not be permitted to prejudice those who are in no fault. The purchaser would not be benefited, any farther than it would invest him with the legal title, to whatever interest the parties to the litigation in the Orphans' Court had. This interest he was entitled to, in equity, and might have there successfully asserted against a mere legal right. The commissioners had nothing but a ministerial duty to perform, under the final decree; they could not convey with covenants of warranty, but their deed would only have operated as a quit claim of the title of the heirs of Winter.

From this view of the case, it is clear that the sale was complete, and in the absence of fraud, &c. the complainants cannot require the defendants to relieve the land from the incumbrance, or to permit them to do it, in part payment of the purchase money. The questions considered are conclusive of the cause, as presented to us, and the decree of the Court of Chancery is consequently affirmed.

TARVER v. ROFFE.

1. A deed of assignment made by a debtor, to secure certain persons as his sureties is not void, because the condition is imposed that they shall have no remedy by sale, under its terms, until they have first paid the security debt.
2. Nor is such a deed void on account of an imperfect description of some of the chattels conveyed by it, though it may be doubtful how far a creditor will be affected by such a description, when he seeks to condemn the property imperfectly described.
3. Where a legal effect can be given to a deed, and property is not placed beyond the reach of a creditor, it is not void *per se*.

Writ of error to the Circuit Court of Franklin.

CLAIM interposed under the statute, by Tarver, to certain slaves, levied on as the property of John M. Lewis, at the suit of Roffe.

The claimant made title to the slaves in controversy, through a deed of trust purporting to be tripartite, to wit—by John M. Lewis, of the first part; Tarver, the claimant, of the second part; and D. B. McClune, D. Carrol, A. S. Christian, C. T. Barton, B. Hudson, B. Harris, and B. Reynolds, of the third part. It recites, that Tarver, McClune, Carrol, Christian and Barton, are the sureties of Lewis, on two several debts due to the Branch Bank at Huntsville, upon which judgments were obtained in the Circuit Court of Madison, on the 29th October, 1839—one of them for $7,103, and the other for $616, besides costs. Also, that McClune and Carrol are sureties of Lewis for another debt of $1,525, payable in instalments as directed by the relief act of 1837: that Harris, and Reynolds, are also sureties for Lewis, on three notes or bonds dated 20th December, 1838, payable to John F. Pride and others, for the several amounts of $1,286, due 1st December, 1839, $1,000 at the same time, $2,286, 1st December, 1840; that Tarver and Hudson are indorsers for Lewis on bills of exchange—one for $2,019, dated 2d April, 1839, at six months, and the other for $2,000, dated

9th September, 1839, drawn on and accepted by Forsyth & Limerick. It also recites, that Lewis is willing and desirous to secure, indemnify, and save harmless all and every of the persons before mentioned from their liabilities as his sureties or indorsors. It then in consideration of the premises, and the further sum of five dollars, paid Lewis, by Tarver, conveys to the latter certain lands and slaves, which are specifically described. Also, twenty-five head of horses and mules, then in possession of Lewis; two hundred head of hogs, four wagons, two carts, farming and plantation untensils; all the household and kitchen furniture then in possession of Lewis, and the then ungathered crop of cotton, and corn, raised that year by Lewis; and declares that the conveyance is upon the trusts, and for the uses and purposes following, that is to say:

1. That Tarver, the trustee, shall permit Lewis to remain in possession of the lands, slaves, &c., until the happening of the following events, to wit: until some one of the persons herein before mentioned, as security or indorser, shall request a sale thereof, and then upon the further trusts, that Tarver, or some one by him specifically authorized, in writing, shall, upon request being made, sell so much, or such part of said land, slaves, and other property, as may be necessary to pay the debt on demand for which such person making the request, is, or shall be bound, provided that no person shall be authorized to compel a sale of any part of said property, until judgment is obtained against him, and until he has paid the same as security or indorser of Lewis. The said Tarver, or his assigns, authorized by the deed to sell, shall in all cases give public notice, at least thirty days, in some newspaper of the time, and place of sale, and shall sell at public auction for cash; and the proceeds arising from such sale shall be paid to the discharge of the debt or demand, which the person making the request is entitled to, by reason of his having paid money as security.

2. It is expressly provided and agreed by Lewis, that in case any arrangement shall be made, and entered into, between himself and the Branch of the Bank of the State of Alabama at Huntsville, whereby the judgments mentioned shall be satisfied, by a renewal of the original notes, and the giving of other personal security, that the said Tarver, &c., shall hold the pro-

perty, as well for the benefit of any additional security that may be added, as those whose names may be hereafter added to the said debts, notwithstanding any form the said debts may undergo by renewal, &c.

3. It is further agreed, that the said Lewis, in all cases where Tarver is security or indorser for him, on any of the debts mentioned, the said Tarver, &c., may sell for the purpose of indemnifying himself and his co-securities or indorsers, at any time after judgment is rendered against him, and from the moneys arising from such sale, the said Tarver, &c., shall pay off and discharge said judgment. The deed is dated the 18th of September, 1840, and was executed by Lewis and Tarver. The execution and consideration being proved, the Court charged the jury, the deed was fraudulent on its face and void, to which the claimant excepted, and here assigns the charge as error; also that a judgment is rendered against the sureties on Tarver's claim bond for the costs of suit.

McClung and E. D. Townes, for the plaintiff in error, made the following points:

1. Fraud arising on the face of a deed is a dry question of law, and must be determined by inspection, without the aid of other matters extrinsic to the deed. [Swift v. Fitzhugh, 9 Por. 63; Mordecai v. Tankersley, 1 Ala. Rep. N. S. 102.]

2. Possession remaining with the grantor until a default in the condition of the deed, so far from being conclusive, is not even evidence of fraud, as it is consistent with the deed. [Johnson v. Cunningham, 1 Ala. Rep. 258; Magee v. Carpenter, 4 Ib. 474.]

3. A deed becomes fraudulent, only in consequence of an illegal reservation of benefit to the grantor, hindering and delaying creditors. [Foster v. Goree, 4 Ala. Rep. 440; Magee v. Carpenter, Ib. 474.]

4. The ungathered crops of corn and cotton, would have passed with the fee of the lands, and their specific conveyance evidences fairness, and not fraud. The inaccuracy of description of the personal chattels, or rather the want of a specific description, cannot affect the validity of the deed. At most, this, as well as the comparative value of the estate conveyed, to the debt secured, was proper to be left to the jury.

5. It will probably be said, the deed trammels the rights of the sureties and indorsers, instead of protecting them, and that this connected with the reservation of possession to the grantor, must hinder and delay the principal creditors. This, if true, would be a badge of fraud. But the sureties, *at law*, have no other rights, than to compel suit against their principal, and to force him to refund actual payments. Neither of these rights are impaired. Besides, Tarver, the principal surety, is authorized to sell for the benefit of himself, and co-sureties, whenever judgment is obtained against him, and the deed shows two such already rendered. Others of the debts were not due, and the deed itself looks to, and contemplates the extension and renewal of the chief debt—thus bringing the deed within the principles of Johnson v. Cunningham, 1 Ala. Rep. 258, and McGee v. Carpenter, 4 Ib. 474.

6. That a debtor may protect sureties, or prefer particular creditors, is conceded by all adjudications; and the limitations of this right are well settled in Gazzam v. Poyntz, 4 Ala. Rep. 374, Ashurst v. Martin, 9 Porter, 566; and there is nothing in these decisions to invalidate this deed.

W. Cooper and J. A. Nooe, for the defendant in error, insisted:

1. Where the validity of a deed is in question, it is one of law for the Court to pronounce on the contract disclosed. [Richardson v. Hazzard, 1 S. & P. 137.]

2. Though a debtor may prefer one creditor to another, by an assignment of his estate, upon trust, and in good faith, yet if the assignment be made without the consent of the creditor, and reserves to the debtor a portion of the property for the support or benefit of himself, and be otherwise arbitrary and unjust to the creditors generally, it will be fraudulent in the whole. [Toulmin v. Buchanan, 1 Stew. 67; Brennan v. Oliver, 2 Stew. 47; Murray v. Riggs, 15 Johns. 570; Austin v. Bell, 20 Johns. 442; Gazzam v. Poyntz, 4 Ala. Rep. 374.]

3. A deed of trust can be sustained, only, when the property conveyed by it, is *bona fide*, conveyed for the payment of the creditor, without stipulating for any benefit to the debtor, and where the equitable interests of the creditors are fixed by the assignment itself. [Ashurst v. Martin, 9 Porter, 566; Gesler

Huffner, 1 Iredell, 498; Barnum v. Hempstead, 7 Paige, 568; Groves v. Wakeman, 11 Wend. 203; 2 Kent's Com. 412; McKee v. Cousins, 5 Conn. 449; Richardson v. Hazzard, 1 S & P. 156.]

4. Where possession remains with the vendor, it is not sufficient as against creditors, that the consideration is *bona fide;* to rebut the presumption of fraud, it must appear, that the sale was not made to hinder or delay creditors. [Martin v. White, 2 Stew. 162; Ayres v. Moore, Ib. 336; Miller v. Thompson, 3 Porter, 196; Ashhurt v. Martin, 9 Porter, 566.]

5. The intent to delay and hinder creditors is manifest, from the absurd pretext, that it is for the indemnity of sureties, when at the same time it contemplates no relief to them, until they have actually paid the money. The effect of this is, that the grantor will reap the benefit of the usufruct, until that event transpires, and in the mean time the actual creditor is held at defiance. The same intent is evidenced by the uncertainty of description in the chattels conveyed. No creditor could distinguish the articles conveyed, from others of the same kind remaining with the debtor.

6. In Wiswall v. Ticknor, 6 Ala. Rep. 178, it is said, the possession of the mortgagor after the law day, is a badge of fraud; and here it is expressly stipulated, not only that the debtor shall remain in possession until the debts become due, but the sureties have been compelled to pay them out of their own money. No surety under these terms would ever be active, and thus the debtor is left in possession paying no one.

GOLDTHWAITE, J.—The subject of voluntary conveyances by debtors, has been recently, so fully discussed, and so often examined, by this Court, that the case before us may be determined by a brief reference to principles, considered as already established.

The first inquiry here is, as to the object contemplated by the grantor, in making this assignment. From the recitals of the deed, we ascertain, that the persons named as the third parties, as well as the trustee, are sureties for the grantor, either for debts due at the execution of the deed, or then running to maturity. The professed object is to indemnify and secure these sureties, but the debtor stipulates that none of them except Tar-

ver, shall have a remedy under it, until they have advanced their own money for his indebtedness. This certainly is a singular provision—but, if they have assented to it, the provision itself furnishes no ground to declare the deed void. As sureties at law, they can scarcely be said to have any rights at law, unless that of calling on the creditor to put his demand in suit—Clay's Dig. 532, § 6—that of having a judgment rendered in his favor against the principal when sued without him;—Ib. § 8; and that of requiring the sheriff to levy first on the property of the principal when both are sued, (Ib. 206, § 23,) are so to be considered. In equity, his only redress seems to be by suit to compel a payment. [1 Story's Eq. § 327, and cases there cited.]

It is evident that in none of these modes, does the surety acquire a specific lien upon the estate of his principal, until a judgment is rendered, or decree passed; therefore when the principal proposes to secure him by a specific appropriation of his property, the terms upon which this shall be made, are as much the subject of stipulation, and assent, as they are between mortgagor, and mortgagee. No objection to the validity of the deed arises out of this stipulation. The question is made as to the period, when this deed became operative, so as to bring it within the influence of the decision of Elmes v. Sutherland, (supra,)—even if the circumstances of the execution by one of the beneficiaries, does not *per se*, make it operative to the extent of his liabilities.

2. If the contest here was in relation to the personal effects conveyed by the deed, under the imperfect description, to which our attention is called, it would deserve great consideration, whether a creditor not preferred could be affected by it, for no means are afforded by which the property thus described, can be known or separated from other things of the same kind retained by the debtor. But this imperfect description, we think, has not the effect to avoid the deed in other respects; as is it does not necessarily create the presumption of fraud, and even if it did, is capable of explanation by extrinsic proof. It is held in many cases, that whenever a description or designation of the person, or thing intended, is applicable indifferently to more than one subject, extrinsic evidence is

missible to prove, which of such subjects was intended. [3 Cowen and Hill's notes, 1362.]

3. As to the effect of the deed to hinder and delay creditors, in consequence of tying up the property from sale, at the suit of unpreferred creditors, until after a request to sell by the sureties indemnified by the deed, this was very well fully examined in Dubose v. Dubose, supra; where we endeavored to show, that such a consequence did not result, as any creditor by suit in equity, might compel a sale, whenever his execution is returned no property. Besides this, if the possession continued with the debtor under the terms of the deed, many cases determine, that this possessory interest is the subject of levy and sale. [Purnell v. Hogan, 5 S. & P. 192; McGregor v. Hall, 3 Ib. 399; Perkins v. Mayfield, 5 Porter, 182; Williams v. Jones, 2 Ala. Rep. 314; Bank v. Willis, 5 Ib. 770.]

In addition to these remedies, there is another applicable to the principal creditors to whom the debts are due, the sureties to which were intended to be indemnified by this deed. It is held in many cases, that where a surety is indemnified by his principal, the creditor may resort to the fund thus appropriated for his indemnity. [Wright v. Morley, 11 Vesey, 22; 2 Story's Eq. 656, § 639.] Whether a creditor would be entitled to this remedy, without first exhausting his legal remedies against principal and surety, is a subject which we need not examine.

We have thus endeavored to show, that this deed is harmless as a means to perpetrate fraud, and the consequence is, that it cannot be pronounced void upon inspection.

Judgment reversed and cause remanded.

SMITH v. BRANCH BANK AT MOBILE.

1. A check drawn upon the Bank payable to bearer, indorsed by the proper officer that it was "good," is *prima facie* an admission by the Bank, that the money drawn for, is in Bank subject to the order of the drawer. This presumption may be repelled by proof, as that the admission was made by mistake.
2. Such a debt, if due, is not barred by the statute of limitations of three years.

Error to the Circuit Court of Clarke.

ASSUMPSIT by the Bank, against the plaintiff in error, for money paid, laid out, and expended, &c.—and judgment for the plaintiff. Pleas, non-assumpsit, and the statute of limitations.

Upon the trial, a bill of exceptions was taken, from which it appears, that the plaintiff, with other testimony, which it offered to maintain the action, proved, and read to the jury a check, as follows:

MOBILE, February 16, 1838.

Branch of the Bank of the State of Alabama, at Mobile, pay to my note, or bearer, seventeen hundred and thirty dollars and thirty-eight cents.—($1,738 38.)

NEAL SMITH.

On the face of the check it was certified to be good, by the proper officer of the Bank.

The defendant's counsel moved the Court, to charge the jury, that the check was presumptive proof, that the defendant had on deposit in Bank, the amount for which the check was drawn, and that under the plea of the statute of limitations, they should find for the defendant, if they believed three years had elapsed, between the time the action had accrued and the commencement of the suit.

The Court refused these charges, and the defendant excepted, and now assigns them as error.

GRAHAM, for the plaintiff in error.

BLOUNT, contra.

ORMOND, J.—A check drawn upon a Bank, is an order to pay the money recited in it, to the payee, or bearer. The check itself, is a mere assertion of the drawer of his right to draw, but if the money is paid pursuant to the directions of the drawer, it is *prima facie*, an admission by the Bank, that the money drawn for, was in Bank to the credit of the drawer. The same effect must result, from the admission made in writing upon the check, by the proper officer of the Bank, "that it was good," which, in mercantile phrase, is synonymous with a declaration, that it will be paid on presentment to bearer.

This presumption might be repelled, in either case: as for example—by showing that the payment, or admission, was made by mistake, and it is now insisted, that we must assume, that the other evidence spoken of in the bill of exceptions, was sufficient to destroy this presumption. Such may have been the fact, but if so, the Court could not pass upon the testimony, and determine the effect. Whether the other testimony in the cause. did, or did not, destroy the presumption arising from the admission of the Bank, was peculiarly the province of the jury to decide.

The question made upon the statute of limitations, was correctly decided by the Court. The statute of limitations of six years applied, unless this was an "open account." That it was not an open account, so far as it is disclosed upon this record, is shown by the case of Sheppard v. Wilkins, 1 Ala. Rep. 62, and especially by the case of Caruthers & Kinkle v. Mardis' admr's., 3 Ala. Rep. 599.

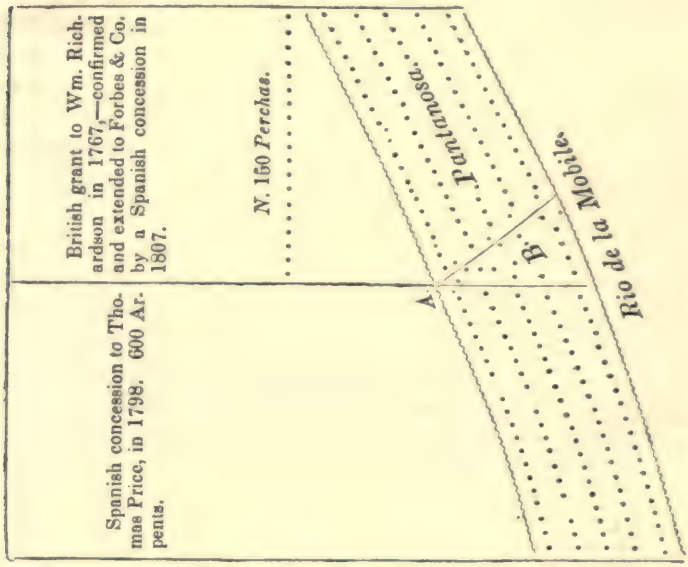
For the error of the Court in the first charge to the jury, the judgment must be reversed, and the cause remanded.

HALLETT AND WALKER, ET AL. v. DOE EX DEM. HUNT, ET AL.

1. The act of 1819 in respect to certain claims to land, south of latitude thirty-one, west of the Perdido and east of New Orleans, embraces several distinct classes of claims; the first is "Perfect grants." These are recognized as valid and complete in themselves, and do not require a patent to issue, or further act by the government to impart to them legal validity: it is admitted that *per se* they possess this quality, and operate *proprio vigore.*
2. It was clearly competent for Spain, while it continued in possession of the territory ceded to the United States by the treaty of Paris, to grant the lands within the same, with the assent of the United States; and the subsequent recognition of such grants by Congress, will impart to them validity.
3. A grant may be made by a law, as well as by a patent pursuant to a law; and a confirmation by a law, is as fully to all intents and purposes a grant, as if it contained in terms a grant *de novo.*
4. The first class of claims embraced by the act of 1819, are not affected by the requirements of the eleventh section of that act, and it is not essential to the title of claimants coming within that category, to cause surveys to be made of the lands to which their title has been recognized.
5. A commissioner appointed to investigate and report upon claims to land, within the territory ceded to the United States, by the treaty of Paris of 1803, stated in his report, the number of acres granted to a claimant by the Spanish government; afterwards Congress by statute recognized the title of the grantee as complete independent of the right of the United States: *Held*, that the title must operate co-extensively with the terms of the grant, although it may embrace more land than the quantity stated in the commissioner's report.
6. *Semble:* Inchoate claims to lands were not changed in their character, by the treaty which ceded Louisiana to the United States; that treaty only imposed upon the Federal Government a political obligation to perfect them; and when the government exercises its powers and confirms the title to one of several adverse claimants, the title thus confirmed, must necessarily in a Court of law, be considered paramount.
7. Where the length of a line is written across a plat, which accompanies a grant of land, it will not control the boundaries which are expressly declared upon the face of the grant.
8. The leading point of Hagan, et al. v. Campbell and Cleaveland, 8 Porter's Rep. 9, in which it was determined that the north and south lines of the Spanish grant then in question, continued eastwardly without deflection to the channel of the river, is reaffirmed.

Writ of error to the Circuit Court of Mobile.

THIS was an action of ejectment at the suit of the defendants in error against the plaintiffs, for the recovery of a "parcel of land" situate in the city of Mobile; the form and location of which are shown by the following diagram:



[A. represents the iron-bound stake, and B. the land in controversy—a tract in a triangular form, made above high water by alluvial deposits, or reclamation by art. The plaintiffs claim under Forbes & Co. and insist that they are entitled by the express terms of the grant, to extend their eastern lines to the channel of the river; the defendants claim under Price as riparian proprietors, insist that the lines of both tracts extend only to high water, that each party is entitled to accretions in front of his land; and that the lines of each with the view to embrace accretions, should diverge, so as to strike the river at the point nearest their *terminus* at high water.]

The defendants under the usual consent rule, confessed, lease, entry and ouster, and pleaded *not guilty;* thereupon the cause was submitted to a jury, who returned a verdict of

not guilty as to one of the defendants, and *guilty* as to the others—describing with particularity the lands from which they had ejected the plaintiffs; and a judgment was rendered accordingly.

On the trial the plaintiffs excepted to the ruling of the Court. From the bill of exceptions, it appears that the plaintiffs claimed the land in controversy as a part of the Orange Grove tract; the defendants claimed it as a part of, or appertaining to the Price grant, and the question was, where was the line of division between the two tracts, how far the limits of each extended on the east, and what were the riparious rights of the proprietors. To make out their title, the plaintiffs adduced a Spanish concession, dated at Pensacola, the 25th September, 1807, and made by the Intendant of the Province of West Florida, to John Forbes & Co. In this concession it was stated, that the British Government, in seventeen hundred and sixty-seven, granted to Wm. Richardson a tract of land situate in the District of Mobile, on the west side of the river Mobile: that in seventeen hundred and seventy-four, Pantan, Leslie, & Co. purchased of Wm. Richardson, the tract embraced by the British grant, and that John Forbes (a partner of the house of Pantan, Leslie & Co., then continued under the firm of John Forbes & Co ,) by his memorial to the tribunal of the Intendancy of West Florida, asked a confirmation of his title. It is then recited in the grant, that the memorial with the accompanying documents, were referred to the appropriate officers of the Spanish Government, and their action thereon is stated.

The survey of Don Josef Collins, the assistant surveyor, as corrected by Don Vincente Sebastian Pintado, the Surveyor General of the Province, is referred to, and the corresponding title to be issued. The concession recites, that the errors in the "plat, or figurative plan" of Collins, made on the second of May, 1802, are "in the reduction of acres into arpents, supposing two hundred and eighty of the last to be two hundred and sixty-three of the first," and "in the superficies of the trapezium, which figure said land represents; which according to its dimensions, contains two hundred and eighty-seven arpents." It is then affirmed, that "two hundred and sixty-three English acres are equal to three hundred and ten arpents,

seventy-seven and one-eighth perches, as calculated by the Surveyor General; and the distance in the plat marked out, as being from the river to the limits (east) of the land, and left unsurveyed at that period, being impassable, has since been rendered useful, by the owners having ditched and drained the same, which they are to receive in compensation for the above mentioned error; with the reserve however, of leaving a free passage on the bank of the river, without altering the figure of said tract on the other side" After making these recitals, with others, which need not be noticed, the concession proceeds thus: "Whereupon, exercising the power which the King, our Lord (God preserve him) has conferred on me in his royal name, I confirm and ratify to the before mentioned John Forbes & Co., the possession of the three hundred and ten arpents and seventy seven perches and one eighth of land, which are superficial, and contained in the plat number one thousand, eight hundred and nine, with the correction made by the Surveyor General, in order that they may, as their own property, possess, sell or dispose of the same, at their own free will and pleasure, (provided, it does not interfere with the claims of a third party,) with the condition, that they have to observe and comply with the land regulations published by this Intendancy, on the seventeenth of July, seventeen hundred and ninety-nine, or as far as it relates to the local situation and quality of the land. In testimony," &c.

James Innerarity testified, that John Forbes & Co., were in possession of the Orange Grove tract as early as 1802; and he has been informed, that their possession dated back to a time previous thereto; that the line now claimed by the plaintiffs was the south boundary of the land in the Spanish times; on that line there was no cultivation or improvement, but there was a house and field occupied by John Forbes & Co., some distance north of it, and the line itself was marked on trees running back from the high land, and was, as witness understood, run and marked by Collins, the Spanish surveyor, and was claimed by the grantees to be their southern boundary. Along that line there was a cart road, which run from the edge of the high land back some distance, and then turned off to the plantation; witness considered the grantees in possession to that line, although it was not actually occupied by im-

provements: Further, in front of the house and field, and at some distance above the land sued for, a part of the low ground was reclaimed and ditched to the river, and used as a rice field, but since abandoned. At the edge of the high land, (the spot pointed out to Mr. Henshaw,) on the south line, there was a stake.

Mr. Henshaw was next introduced as a witness by the plaintiffs, who proved a survey made by himself for the plaintiffs, in the year 1832, which was given in evidence to the jury. Witness deposed to the courses and distances marked on the map made by him—said he commenced on the south line at the stake shown him by Innerarity, and ran to the place for the south-west corner, but found neither corner, nor marked trees; there was an old pine stump not far off, and it was the only sign of a tree about there. Witness found the north-west corner and the north line distinctly marked. The laurel at the north-west corner was marked with Collins' survey-mark. The south boundary was at a greater distance than one hundred and forty French perches from the north. In running out the south line to the river, witness went much beyond the iron-bound stake, to Kennedy's wharf, and to the channel: this latter point was inaccessible to him, in consequence of the depth of water; but he calculated geometrically. He considered that the outer edge of the drift wood indicated the course of the river, and according to the survey was north 13° west.

Plaintiffs then laid before the jury as evidence, a map reported by Lewis Troost, pursuant to an order of survey made in the cause, in which the land in question is delineated, and proved the distances, courses and contents as therein shown. A copy of this map is attached to the bill of exceptions, and from it, the diagram of the land in question is mainly drawn. Troost was introduced as a witness, and proved that the Parish perch was equal to 19 17-100 English feet; that ten perches on each side, or one hundred square perches were an arpent; that an English chain is sixty-six English feet, and is divided into one hundred links; that an acre is one thousand links on each side, or one hundred thousand square links.

The grant to John Forbes & Co. consisted, as shown by Troost, principally of high lands—in front of the high land

was a flat or swamp of wet and muddy land, of hard bottom, formerly covered with timber; in front of this flat land was a marsh, in which long grass and flags grew in soft mud. This latter is now without timber, generally covered with water, and in front of it is the clear water of the river: at some distance out in the water, is what is the channel of navigation of the river, where the water is nineteen or twenty feet deep.

It was also testified by plaintiffs' witnesses, that the outer edge of the marsh, which they insisted was low water-mark, was at, or below where Water street now is.

The plaintiffs deduced title to themselves through John Forbes & Co. by mesne conveyances—they did not give in evidence, or rely upon any location of their title by the authority of the Government of the United States, but claimed to hold by virtue of their title as proved, without being limited or bound by any survey or location made by the government.

The plaintiffs adduced the evidence of the confirmation of the claim of John Forbes & Co., and here rested their case.

The defendants gave in evidence, a Spanish grant to Thomas Price, together with the confirmation thereof by the United States, as well as the surveys, locations, certificates, reports, and patents issued by the Federal Government to Joshua Kennedy—copies of all which are made part of the bill of exceptions. The location of the lands embraced by this grant, will appear by the diagram already made. The defendants also offered evidence to show, that Price had conveyed his interest to Wm. E. Kennedy, and the latter to Joshua Kennedy; then proved the death of Joshua and a devise by him to Hallett and Walker; that Price, Wm. E. and Joshua Kennedy, had been in possession under the grant to Price, that the defendants were in possession, and that they had made improvements on the land.

The defendants also adduced proof tending to show, that at the dates of the grants to Price, and John Forbes & Co., the ordinary high tide flowed farther west than the *iron-bound stake*, and that the ordinary low tide extended to that stake; since that time the flats have been filled up by deposits, by washing from the upland, and by artificial means; and houses and wharves have been erected thereon, and streets laid off over the same, as indicated by the diagram. Formerly the

high water came to the foot of the upland, and still does at places not filled up, so that at very low tides the marsh is uncovered. The ordinary tide of the bay is two or three feet, and the extremes of high and low water are five or six feet, depending upon the winds and seasons. They also offered evidence tending to show, that the line between the Price and Forbes grants in Spanish times was one hundred and thirty feet north of where it is now laid down by Weakley, the United States Surveyor.

The defendants also gave in evidence copies from the land office of the application of John Forbes & Co., for the confirmation of his title to the Orange Grove tract, and the confirmation of the same. They further showed, that the land was located and surveyed under the authority of the United States subsequent to the confirmation of title: first, by James Dowell as Surveyor of the United States, and again by James H. Weakley, Surveyor General of the United States for Alabama. The latter surveyed both the Price and Forbes tracts, and run the line between them. These several surveys are protracted on a diagram, which makes part of the record. It was also proved, that the iron-bound stake is at the point shown on Weakley's survey, as the north-east corner of the Price, and the south-east corner of the Forbes grants.

It was also shown by the defendants, that a survey was made of the lands claimed by the plaintiffs under John Forbes & Co., by Henshaw, as a surveyor of the United States, that according to this survey, the Forbes grant contained more land than it called for, and the Price grant, as located by the United States, contained a less quantity.

The defendants then offered a correspondence and report of Weakley, the surveyor, and other public documents of the land office, in respect to the location and survey of the claim under which the plaintiffs deduce a title. The documents were objected to by the plaintiffs, as irrelevant, on the ground that their title had been previously confirmed and complete, and could not be affected by the survey, though ordered by the United States. The objection was sustained, and the evidence rejected. Evidence was also adduced of a proceeding in the land office, showing a decision on the location of the Price grant, to which the plaintiffs were parties; and also a report on

the location of the plaintiff's title, from the general land office; the admission of all which was objected to, for the reason last above stated, the objection sustained and the evidence rejected.

Upon these facts, the Court charged the jury as follows: 1. The grant under which the plaintiffs claimed, having been confirmed as a complete title, their title could not be affected or limited by any survey made by the United States; that such a survey was not necessary to enable the plaintiff to recover of the defendants. The Spanish concession, and confirmation by the Federal government, entitled them to all the land embraced by it, and they might prove what was the location of the land according to the title itself, and would take accordingly.

2. The terms employed in the grant of Forbes & Co. authorized an extension of the north and south lines, eastwardly, in a direct line across the flat, to the channel of the river. That by the channel of the river, is meant the limit of the water at the ordinary low tide, at the time the grant was made.

3. That the jury should find from the evidence, the south boundary of the Forbes grant, without regard to Weakley's or any other survey made under the authority of the government, and continue the south line to the channel, and from that point the law would give to each party the water rights in front of his land, by drawing the straightest and nearest line to the channel, and dividing the increase or loss between them (if any,) by the curve of the river; but all to the westward or low water mark, at the date of the grant, and north of the south boundary, were embraced within the plaintiff's claim, and they were entitled to recover accordingly.

The defendants, by their counsel, prayed the Court to charge the jury as follows: 1. The grant to Forbes & Co. entitled the plaintiffs to hold the land, to the point where the high tide ordinarily flowed, at the time it was made, together with the accretion, by alluvial deposits since, and no more; their right to the flat, or marsh, was merely as riparian proprietors, and the lines across the same should not be governed by their course over the upland, but by the extent of front on the river.

2. If the defendants had shown title derived from the Spanish government, which was confirmed and located by the United States, and the north-east boundary of their land, as called

for by the Spanish survey and patent, was at the iron-bound stake; then, they were entitled to hold, in virtue of their title to that point, and as riparian proprietors, from that point directly to the channel of the river, or in proportion to their front. The plaintiffs, without proof that their claim was located by the authority of the United States, could not interfere with the defendants, by extending their lines in front of the defendants; and that under the Forbes grant they could not recover of the defendants. That this latter grant could not prevail against that to Price, if the latter was located and a patent therefor issued by the United States, and that to Forbes & Co. was not thus established.

3. If the lands embraced by the Forbes and Price grants were surveyed and located by the United States, and a patent issued to the assignee of the Price tract accordingly, such survey was binding on the plaintiff. In such case the survey would ascertain the eastern limits of the respective tracts, and their rights as riparian proprietors would there commence.

4. If the plaintiffs rely on the location according to their Spanish title, without the aid of any survey by the United States, if the north line was ascertained and uncontroverted, and the north-west corner recognized, and no corners ascertained, or found on the south line, then the plaintiffs could not come south a greater distance than one hundred and forty perches, but were bound by the distance of the breadth called for by their Spanish survey and grant.

5. The land granted by the Spanish government to John Forbes & Co. in front of the English grant is not confirmed by the United States according to the record certified from the land office, and cannot be so regarded by the Court. All of these several charges the Court refused to give to the jury.

A. F. Hopkins and G. N. Stewart, for the plaintiffs in error, made and argued the following points: 1. In 1807, the Spanish government was incompetent to grant lands, west of the Perdido—the United States having become the proprietor of the country, under a treaty with France, in 1803; consequently the concession to Forbes & Co., if intended to convey more land than was embraced by the British grant to Wm. Richardson, would be inoperative as to the excess. [2 Peters' Rep.

253; 12 Id. 511; 14 Id. 170; 8 Porter's Rep. 33, 176; 9 Id. 590, 597, 602-4; 3 Ala. Rep. 47.]

2. There is no conflict between the Price claim, and the alledged British grant to Forbes & Co—the latter does not include the land in controversy.

3. The grant under which the plaintiffs' claim was confirmed by the United States, for three hundred and ten arpents, 77½ perches, and this it is said, was the quantity of the supposed British grant. The only evidence of the British grant is, the recital contained in the Spanish concession; and this latter having been made after the United States became the proprietors of the country, it is a nullity, and the plaintiffs can claim under the confirmation only, which does not embrace the shore.

4. The grant to Price is older than that to Forbes & Co., and would have been preferred to it, if the country had continued under the dominion of Spain; and the title must still be considered as paramount. [9 Peters' Rep. 117, 133; 12 Id. 140; 13 Id. 133; 16 Id. 228, 261; Abbot's Ex'r v. Doe ex dem. Kennedy, 5 Ala. Rep. 393.] If there is a conflict as to the riparian rights under the Price grant, and the alledged British grant to Richardson, the latter must yield to the former. But there is none; the conflict, (if any,) arises from the enlargement of the British grant, by the Spanish concession, in 1807; this latter was to Forbes & Co., after the grant to Price, in 1798, and the confirmed additional grant to him in 1806.

5. Conceding that there is a conflict between the concession to Forbes & Co. as confirmed by the United States, and the grant to Price, it must arise by the confirmation of the former, embracing the shore. The United States cannot confer upon an individual the title to the land between high and low water; and consequently, cannot confirm an invalid Spanish grant, to make it thus operate. By the treaty of Paris, the Federal government held the shores in trust for the States, to be formed out of the territory acquired thereby, and the compact proposed to Alabama, was entered into on the part of the United States, the day previous to the confirmation of the void grant to Forbes & & Co. [9 Porter's Rep. 590-7, 602-4; 3 Ala. Rep. 47.] The plaintiffs, then, showed no title to the premises in question, and it is immaterial whether the defendants have a good title or nor; as they are in possession, they can hold it against all per-

sons who do not show a superior right. But the defendants, in virtue of the confirmed grant to Price, have a clear right to the property in dispute, as riparian proprietors, if the view taken of the plaintiffs' claim be correct.

6. The lines of the Forbes grant could not be extended beyond those called for by Collins' survey; and the Circuit Court consequently erred in permitting the plaintiffs to recover land lying south of these.

7. As the concession to Forbes & Co. specifies no quantity, and the confirmation is for three hundred and ten arpents, 77⅓ perches, the quantity expressed in the alledged British grant, and less than is embraced in the Spanish concession, it is necessary to show a survey on the part of the United States, to ascertain the location of the tract, to which the title was confirmed; and this, although the confirmation be valid, and may operate retrospectively.

J. A. Campbell, for the defendants in error. The land in dispute is not embraced by the defendant's title—the survey of the United States, and the patent issued pursuant *thereto*, to Joshua Kennedy, is by *metes and bounds;* the patent conveyed only the lands within those bounds. Even supposing the Price grant was bounded by the river, it did not extend below high-water mark. But it can only be looked to as it was surveyed and located by the United States—the patent furnishes the highest evidence of location. It is the performance of the act, that the Spanish Governor, Gayoso, ordered—it is giving title in form, which the order presupposes.

The first instruction is that, on which most stress is laid. This involves the construction of the act of Congress of the 3d March, 1819. [Land Laws, part 1, p. 316.] This act recognizes the title of Forbes & Co. as *complete and valid.* [See report to which it refers, Am. State Papers, Pub. Lands, vol. 3, p. 7.] And the report is made under the act of 25th April, 1812. [1 Land Laws, 208.]

The recognition of a grant as a valid and perfect title against the claim of the United States, is an admission that Spain was the owner of the soil at the time of its date, was authorized to make, and had made a complete and valid disposition of it; and such a recognition is binding on the judiciary. In defer-

ence to the executive, the judiciary has denied the power of Spain to dispose of the territory between the Iberville and the Perdido, since the treaty of St. Ildefonso; but in respect to perfect grants, specified in the report referred to, Congress have in effect, declared that the power of Spain is ample. This being the case, these concessions became valid by the law of nations, and are entitled to their protection; and it would be an act of confiscation to impair or defeat them. [2 Peters' Rep. 317; 14 Id. 365.] The recognition affirms their validity *ab initio*, and it cannot be gainsayed—in fact the act of Congress is a grant in itself. [8 Cranch's Rep. 229; 9 Id. 43; 6 Peter's Rep. 735-6 7-8; 14 Id. 390, et seq.] In such case no patent is necessary, the confirmation operates as a patent. [6 Peters' Rep. 723-4; 1 Land Laws, 92-3-4, 122; 12 Peters' Rep. 418, 452-3-4; 1 Land Laws, 214, 506, 557, 345; 2 Id. 666, 1042-4, 878, 891; 1 White's Recop 701.]

The act of the 3d March, 1819, embraces four classes of claims: 1. Perfect grants; these are recognized as valid and complete. 2. Imperfect titles; these are confirmed. 3. Donation claims; these are entitled to a grant. 4. Actual settlers; these have only a preference right. The eleventh section allows the register and receiver to survey the lands that are "confirmed," "or directed to be granted as donations," and to cause any other surveys to be made. This permission to direct surveys, was for the information of the land office, but does not bind individual rights. The twelfth section shows this to be so, in allowing patents to be confirmed, and donation claims, and certificates, only to be recognized claims; and the 4th section of the act of 8th May, 1822, conclusively shows, that no survey is authorized of claims of the latter description. [1 Land Laws, 353; 14 Peters' Rep. 379, 380-1-2-3; 1 Land Laws, 429, 455; 2 Id. 23, 712, 716.] These citations show, that the survey of a recognized claim is not provided for, by Congress; and when the certificate of confirmation has issued, the land office cannot direct it. In the present case, the survey was made in 1835, and the certificate had issued years before, to Forbes & Co.

The construction of the concession under which the plaintiffs deduce title, is satisfactorily shown in 8 Porter Rep. 9; 9 Id. 405, 590; 1 How. U. S. Rep. 95; see, also, 4 Eng. Exch. Rep.

429, 430; 6 Id. 344; 6 Peters' Rep. 723-4; 12 Id. 410; 14 Id. 353; 1 White's Recop. 367-8-9, 359, 371; 2 Id. 502-3.] A reference to these authorities will also make it apparent, that Great Britain or Spain may grant the shore of the navigable waters within their colonies. [See also, Martin, et al. v. Waddell, 16 Peters' Rep. 367; 4 Wash. C. C. Rep. 371.]

The people of this State have the right of navigation, &c., of the waters within it, yet the sovereign power may make qualified grants, so that the rights of the citizen are not impaired. The United States was the sovereign of the soil of Alabama, up to the time that she consented to become a member of the confederacy; and Congress, up to that time, might rightfully grant the shore. If the United States had tacitly, or impliedly, dedicated it to public uses previously, an individual cannot avail himself of such dedication, so as to limit the power of the Federal government over the subject.

The recognition of the grant to Forbes & Co., was retroactive. The assertion by the United States of a title to the country, between the Iberville and the Perdido, was for national purposes; but when this claim of the Federal government was withdrawn in favor of individuals, it was as if it had never been made. [8 Peters' Rep. 310, 314, 365; 2 Am. State Pap. Foreign Relations, 627-8-9.]

It is not permissible to go behind the confirmatory act of 1819, and inquire whether the grant to Price, is more potent in itself, than that under which the plaintiffs claim. Congress there recognize the act of Spain as valid, and operative against the Federal government, and individuals. The qualified confirmation of the Price grant to Kennedy, shows that the plaintiffs' claim was excepted from its influence.

The idea that the concession to Forbes & Co. is recognized for three hundred and ten arpents, 77⅛ perches, and no more, is not well founded. In the report of the commissioner, it is described as a "claim," under a "complete grant," the authority by which it was made, date, quantity, &c. The act of Congress says nothing about quantity, but merely recognizes the validity of the concession, and this establishes it, according to the legal effect of its terms. [See Report, in 3 State Papers, Public Lands, and acts of 1812 and 1819; 1 Land Laws, ut supra.]

The concession to Price, in 1798, was without survey or location, it was afterwards confirmed by a subordinate Spanish officer, with an order for a resurvey, that titles in form might be presented. All this, if genuine, made but an incomplete title, and was inoperative by the acts of Congress of 1804 and 1805. [1 Land Laws, 114, 123] The grant by Gayoso, in 1798, was laid before the commissioner under the act of 1812, (3 State Papers, Public Lands, 11;) the other evidences of title, dated in 1806, were brought before the commissioners by J. Kennedy. [3 State Papers, Public Lands, 440; 5 Id. 128.] By the second section of the act of 1829, the Price claim, which had been submitted on a special report, was confirmed on terms which are stated in the fourth section; and by the fifth and sixth sections, a survey, location and survey are authorized to be made and issued. All this cannot in any manner affect the recognition, in 1819, of the Forbes grant. [12 Peters' Rep. 454.]

The time for presenting claims under the acts of 1819 and 1822, had elapsed, and Kennedy was without remedy or hope, until the act of 1827, (1 Land Laws, 429.) was passed. Under this state of the case, and regarding the terms of the patent, it is not allowable for the defendants to go behind it. The patent is the consummation of a title, prescribes the metes and bounds of the land, and the party holding under it, must look to it as the highest evidence of his title, and can claim no more than the United States has thereby renounced.

The letters of Weakley, the surveyor, were clearly inadmissible, because they were improper evidence in themselves, and tended to establish no material fact. His location of the Forbes grant, as far as he run the lines east, is not objected to; but it is insisted that he had not the right to construe it to the prejudice of the grantees, or those claiming under them. As for his location of the Price claim, the plaintiffs did not dispute it. [1 Phil. Ev. 230.]

The opinion of the solicitor of the treasury, was also properly rejected—it does not appear that it was adopted by the department, and if it was, it cannot conclude all inquiry upon the points it determines. Besides, it was merely intended to inform the department, whether a patent could rightfully issue, in the particular case; when it has issued, all previous inqui-

ries are merged, and the patent becomes evidence of title, so far as it was vested in the government, but does not affect any pre-existing right. [9 Peters' Rep. 225.] In every point of view, the opinion is irrelevant evidence. [7 Cranch's Rep. 354; 2 Lomax on Real Property, 388]

The act of the 2d March, 1819, providing for the admission of Alabama into the Union, did not restrain the powers of Congress until the terms were accepted; and, consequently, the act of the 3d March is operative, although it recognizes the right of Forbes & Co. to the shore. [Mr. Calhoun's speech on the admission of Michigan; and 6 Peters' Rep. 748-9; 7 Id. 51.]

As to the question of boundary, it was properly referred to the jury—they might consider possession for a great length of time as sufficient, especially if acquiesced in by all parties. The iron-bound stake is the admitted boundary; this has been settled in the survey for the defendants. In fact, the call of the Price grant, made in 1806, is for that to which the defendants claim. [7 John. Rep. 242; 6 Wend. Rep. 467; 10 Id. 104; 12 Id. 422; 6 Peters Rep. 499.]

The lines were marked, as well as traced on the survey, which made a part of the concession to John Forbes & Co.; this being the case, the charge prayed in respect to the boundary, was properly refused. [4 Ala. Rep. 581; 18 Wend. Rep. 157.]

Kennedy derived his title from the United States. The act of confirmation is a mere relinquishment of the claim of the United States; and the patent which issued is qualified and restricted, as has been already said. Kennedy, then, was privy to the title under which the plaintiffs claim, and is consequently bound by the recitals therein, in respect to the British grant. [4 Peters' Rep. 83, 88.]

There is no evidence in the bill of exceptions, that the point at which the jury have found the south-east corner of the Forbes grant, was covered with water in 1819, or that any of the land between high and low water, in 1806, was there in 1819.

If it were allowable to look behind the patent, to the Price grant, then it might be shown that the powers of Gayoso, who made it, as the representative of the King of Spain, had ceased previous to its date.

COLLIER, C. J.—The fourth section of the act of 1812, "for ascertaining the titles and claims to lands, in that part of Louisiana which lies east of the river Mississippi, and island of New Orleans," directs, that persons claiming lands in that "tract of country," by virtue of any grant, order of survey, or other evidence of claim whatsoever, "derived from the French, British, or Spanish governments," shall exhibit their claims to the commissioner appointed for the examination of the same, that he may cause them to be recorded, &c. By the fifth section, the commissioner is authorized "to inquire into the justice and validity of the claims" filed with him, &c; and the seventh section requires the commissioner, &c. to prepare, &c., abstracts from the records of claims exhibited, and report them to the secretary of the treasury, who is to lay them before Congress, "for their determination thereon" [1 Land Laws, 208, ed. 1838.] The lands in question being situated within the territory to which the statute refers, the then claimants submitted the evidence of their title to the commissioner for examination, who reported thereupon in November, 1817, that John Forbes & Co. were then, as well as originally, the claimants under the Spanish government, by grant, dated 25th September, 1807. That the quantity claimed was three hundred and ten arpents, 77⅛ perches, situated near Mobile, surveyed on the 14th September, 1807, and cultivated since the year seventeen hundred and seventy-nine, &c. He further reported, that the claim was founded on a complete grant which was valid, agreeably to the laws, usages and customs of Spain.

On the third of March, 1819, Congress legislated upon the commissioner's report, and enacted, "that all the claims to lands founded on complete grants, from the Spanish government, reported to the secretary of the treasury, by the commissioners, from the district east and west of Pearl river, appointed under the authority of an act, entitled 'An act for ascertaining the titles and claims to lands, in that part of Louisiana, which lies east of the river Mississippi, and island of New Orleans,' which are contained in the several reports of the commissioners, and which are, in the opinion of the commissioners, valid, agreeably to the laws, usages and customs, of the said government, be and the same are hereby recognized as valid and complete titles against any claim on the part of the United

States." The next section enacts that Spanish orders of survey, &c., which are favorably reported, shall be confirmed; *provided*, that such confirmation "shall amount only to a relinquishment forever, on the part of the United States of any claim whatever to the tract of land so confirmed or granted."

It will be observed, that the grant to Forbes & Co. does not derive its legal efficacy from the statute cited. The act of 1819, explicitly *recognizes*, that is, *acknowledges* it to be a valid and complete title against the United States, or any right derived from the United States. It does not confirm or impart to it validity, but admits that *per se* it possessed this quality; that independently of the legislation of Congress, it operated *proprio vigore.*

It is objected to this view of the statute, that as Spain, by the treaty of St. Ildefonso, ceded the country west of the Perdido, and south of latitude thirty-one, to France, it was incompetent for the Spanish authorities, subsequent to the date of that treaty, to grant the land situate within the same; and therefore, the grant to Forbes and company, made some seven years thereafter, was a mere nullity. True, every department of the Federal government has maintained that France thus became the proprietor of this territory, that France ceded it to the United States, and although a portion of it remained in the possession of Spain up to the year 1813, the latter government could make no disposition of the soil subsequent to 1800, when the treaty of St. Ildefonso was negotiated. In thus asserting the rights of the United States, the judiciary was but carrying out the principles and opinions often expressed, both by the executive and legislative departments. It has never been intimated, by any decision, that it was not competent for Spain, during the period of its occupancy, to grant the lands in the ceded country, with the assent of the United States, or that Congress could not recognize its grants as valid. The course of the judiciary has been mainly influenced, by the opinions and course of action of the co-ordinate branches of government; if these had yielded to Spain the dominion of the soil, by acquiescing in her construction of the treaty under which she ceded Louisiana to France, the judiciary would doubtless have re-echoed their conclusion. This the Courts should have done according to strict propriety. Both the executive and legislative depart-

ments, more appropriately represented the nation in the acquisition of this territory, and their interpretation of the treaty, especially if in harmony with the understanding of Spain, would determine its meaning.

In speaking of incomplete titles, originating after the treaty of St. Ildefonso, the Supreme Court of the United States say, "Such claims are certainly not beyond the reach of Congress to confirm, although it may require a special act of Congress for that purpose; and the present claim being founded upon such act, distinguishes it from the doctrine of this Court, in the cases of Foster and Elam v. Neilson, 2 Peters, 253; and Garcia v. Lee, 12 Peters, 511. And such claims have been recognized by this Court as existing claims, and not treated as being absolutely void." [Lessee of Pollard's heirs v. Kibbe, 14 Peters' Rep. 365. See also, Keene v. McDonough, 8 Peter's Rep. 310.]

Mr. Justice Baldwin, in a separate opinion, which he delivered in the case cited from 14 Peters, notices the different classes of claims embraced by the act of 1819. The first, are those founded on complete grants from the Spanish government, which are, in the opinion of the commissioners, valid, and agreeably to the laws, usages and customs of Spain. These we have seen, are "recognized as valid," &c. The learned Judge says, "Both the acts of 1819 and 1822, being founded on the reports of the commissioners, must be taken with reference thereto; and recognizing the claims therein reported as valid, to be complete titles by their intrinsic effect."

The fourteenth section of the act of 1804, "erecting Louisiana into two territories, and providing for the temporary government thereof," enacts, that all grants for lands within the territories ceded to the United States by the French Republic, by the treaty of Paris, in 1803, made after the treaty of St. Ildefonso, shall be deemed null, void, and of no effect, from the beginning; except in certain cases, &c. [1 Land Laws, 114, ed. 1838.] Surely it was competent for Congress to disregard this enactment, and give to the treaty a different exposition as to all grants which were valid by the Spanish laws, or else exempt from its application certain claims, by acknowledging that they are "valid and complete titles," against the United States, or persons claiming under them. This much the act of

1819 has done *in totidem verbis*, and its legitimate effect as it respects the grant to Forbes & Co., is a declaration that the land conveyed by it, vested in the grantees a title superior to any the United States had, or could confer.

It is further objected to the title of the plaintiff below, that it will not sustain an action at law, because no patent was obtained from the United States by the original grantees, or their legal assignees, for the lands they claim. The recognition of its validity by the act of 1819, we have seen, was an admission that it was complete in itself, and that the Federal government had no interest to convey. In Strother v. Lucas, 12 Peters' Rep. 454, it was held, that a grant may be made by law, as well as by a patent pursuant to a law; and a confirmation by a law, is as fully, to all intents and purposes a grant, as if it contained in terms a grant *de novo*. And in Grignon's Lessee v. Eckhart, 2 How. Rep. U. S. 344, it was decided, that an equitable, became a legal title, by its confirmation, by an act of Congress, which was equivalent to a patent. "It was a higher evidence of title, as it was the direct grant of the fee which had been in the United States, by the government itself, whereas the patent was only the act of the ministerial officers." See also, United States v. Arredondo and others, 6 Peters' Rep. 723-4; Land Laws, part 11, ed. 1838, Nos. 864, 1017.

It is not necessary to enable the assignees of Forbes & Co. to maintain an action, to show, that the lands embraced by their grant were actually located, and the limits defined by a surveyor, acting under the authority of the United States. The act of 1819 makes an unqualified acknowledgment of the validity and completeness of their title, without requiring any act to be done. The eleventh section, which is the only one pertinent to the present point of inquiry, makes it the duty of the principal deputy surveyor for the lands south of the State of Tennessee, to survey, or cause to be surveyed, the lands, the claims to which are confirmed, and that are directed to be granted as donations, where the same have not been already surveyed, and the lands which may be claimed by right of pre-emption, whenever directed by the register and receiver, and to execute such other surveys as may be necessary for the ascertainment of the lands as embraced in the report of the commissioners, &c.

The Commissioner of the General Land Office to the Surveyor General at Tallahassee, under date of the 18th August, 1827, says, "The object of a resurvey on the part of the United States, is to ascertain the vacant and public lands; the confirmation confers a legal right, but where there is a controversy as to the title, the claimant must show in a Court, that his survey was legally made under the Spanish Government, and prove his boundaries: whereas, by a resurvey and title derived from the United States, he is relieved from difficulty. [Land Laws ed. 1838, Part 11, No. 864, and No. 878. See also, Strother v. Lucas, 12 Peter's Rep. 454.] In Lessee of Pollard's heirs v. Kibbe, 14 Peter's Rep. 383, the Court considered, that the first class of claims confirmed by the act of 1819, are not affected by the requirements of the eleventh section, and that it is not essential to the title of claimants embraced by that class, to cause surveys to be made. That the grant to Forbes & Co. comes within this category, has been already shown.

Although the commissioner in his report, states the precise quantity of land granted to Forbes & Co. yet this will not limit their claim, and prevent them, or their assignees, from maintaining a title for all that was in fact granted by the authorities of Spain. The statute, as we have said, acknowledges, that the grantees had a complete title, independent of the right of the United States, and it must be permitted to operate according to the terms of the grant. If, by an extension of lines, as this contemplates, the quantity is greater than the commissioner supposes, his report cannot prejudice the title to the excess. In respect to a concession which was confirmed, such was the opinion of the attorney general. [Land Laws ed. 1838, Part 11, No. 20.]

Under the act of Congress of March, 1827, the register and receiver of the land office at St. Stephens made a special report, dated the 23d February, 1828, upon the claim of Thomas Price, entitled, "Special Report, No. 1." In March, 1829, a law was enacted by Congress, entitled, "An act, confirming the reports of the register and receiver of the land office for the district of St. Stephens, in the State of Alabama, and for other purposes;" the second section of which provides, that all the claims contained in special reports, numbered one to

four inclusive, and in a supplementary report of the register and receiver under the provisions of the act of 1827, be confirmed. The fourth section enacts, "That the confirmation of all the claims provided for by this act, shall amount only to a relinquishment forever, on the part of the United States, of any claim whatever, to the tracts of land and town lots so confirmed, and that nothing herein contained shall be construed to effect the claim, or claims of any individual, or body politic, or incorporate, if any such there be." By the fifth section, the location and survey of the lands and town lots situate in the St. Stephens district, confirmed by that and former acts, is provided for; and by the sixth section certificates of confirmation and patents are directed to issue for land and lots confirmed by the act, in the same manner as patents are granted in such cases under former acts. [Land Laws ed. 1838, Part 1, 429-455; Am. State Papers, Public Lands, 5 vol. 128.]

We have seen, that the effect of the act of 1819, is an acknowledgment of the validity of the grant to Forbes & Co., independent of the legislation of Congress. This being the case, the act of 1829, even if it were an unqualified confirmation of the concession, under which the defendants below claimed, it could not be allowed to prevail against the plaintiffs' title. The confirmation would be an act harmless to the latter, of no advantage to the former, and operative against the interest of the United States only; interests, which, if they ever existed, are estopped from being asserted, by the act of 1819.

In the United States v. Arredondo and others, 6 Peters' Rep. 735, it was held, "that no land which had been severed from the royal domain by antecedent grants, which were valid by the laws of Spain, and created any right of property to the thing granted in the grantees, passed to the United States; such lands were not liable to subsequent appropriation by a subsequent grant." A government is never presumed to grant the same land twice.

In Chouteau v. Eckhart, 2 How. Rep. 344, it appears, that Congress, by an act passed in June, 1812, confirmed to the inhabitants in St. Charles, in Missouri, "the rights, titles, and claims, to town or village lots, out lots, common field lots, and commons, in, and adjoining to the several towns and villages of

St. Charles, &c., which lots have been inhabited, cultivated, or possessed prior to the 20th day of December, 1803, shall be, and the same are hereby confirmed," &c. In 1832, Chouteau presented his claim for part of the land embraced by the act of 1812, to commissioners appointed under the authority of Congress, to examine all the unconfirmed claims to land in Missouri. The commissioners reported favorably on the claim, and in 1836 a law was enacted, confirming their reports; with a reservation to all adverse claimants to assert their claims in a Court of justice; and providing further, that the law should not operate against any person who had previously located the land under an act of Congress, or who had purchased the same at a sale by the United States.

The Court, after citing several decisions of the Supreme Court of Missouri, says, "These cases maintain in substance, that such inchoate claims, (as that of Chouteau was in 1812, when the community of St. Charles took its title, previously also inchoate,) were not changed in their character, by the treaty by which Louisiana was acquired; that the treaty imposed on this government only a political obligation to perfect them; that this obligation, sacred as it may be, in any instance, cannot be enforced by any action of the judicial tribunals; and that the legislation of Congress, from 1804 to the present time, has proceeded upon this construction of the treaty, as is manifested by the modes adopted to investigate the claims through boards of commissioners, and then acting on them by legislation. This Court held, likewise, in the United States v. Wiggins, 14 Peters, 350. *Further*, the Federal government being unable to confirm the same land to two adverse claimants, must then, to some extent, determine between the conflicting titles. Each claimant depends upon the justice or comity of the present government; and when the government exercises its powers, and confirms the land to one, it must necessarily be considered, in a Court of law, the paramount and better title." Consequently, the title confirmed in 1812, being *prior in tempore* to that confirmed in 1836, was held to be *potior in jure.*

The case which we have noticed thus at length, would seem to be conclusive against the defendants, even if the title of the plaintiffs, instead of being recognized as perfect, was confirmed as incomplete. It is unnecessary to consider the character

of the qualified confirmation of the Price claim; for if it were absolute, it could not prevail against the grant to Forbes & Co.

In the grant to Forbes & Co. it is said, that the survey made by Collins, in 1802, shows, that the land "is situate in the district of Mobile, and on the west side of the river, a quarter of a league, more or less, to the north of the Fort, and terminated by the bank of said river on the east side, and bounded on the north by lands of Jeremiah Terry, said now to be royal domain; on the south by vacant lands, and a lot belonging to said house (John Forbes & Co.;) and according to information, on the west, by lands of Genevieve Fisher, which are said to belong to the royal domain." The grant has a plat or figurative plan, showing the form and location of the land, across which is drawn a dotted line, running due south from a point where the north line strikes the marsh of the river, over which line is written as follows: "*N.* 140 *Perchas.*" This plat is referred to by the grant, and may be considered as a part of it, but there is nothing therein said as to the geometrical length of either of the lines that limit the tract.

The bill of exceptions shows, that evidence was adduced at the trial, that the south line of the lands claimed by the plaintiffs below was the same as that on which they now insist. It was also proved by the *defendants*, that the lands embraced by the grant to Forbes & Co. was surveyed by Dowell subsequent to its recognition by Congress, and again by James H. Weakley, the Surveyor General of the United States. The latter run the line between the tracts claimed by the plaintiffs and defendants respectively. Both of these surveys are protracted on paper, and the latter shows, that the iron-bound stake is on the south line of the land which the plaintiffs are seeking to recover. In addition to this, it was shown, that the iron-bound stake is correctly located in the plat which illustrates Weakley's survey.

Under this state of fact, we think the Court very properly refused to give the fourth instruction prayed by the defendants, viz: that the grant to Forbes & Co. could not be extended more than one hundred and forty perches south of the recognized north line. There is nothing in the plat, when taken in connection with the recital, or description in the grant, which will thus limit it. The writing along the dotted line cannot

have this effect; for even conceding that it was intended to indicate the length from north to south, it cannot control the boundaries which are expressly declared upon the face of the grant. These determine the dimensions of the tract, though they may, when necessary, be aided and explained by the accompanying plat.

The defendants cannot complain, that they are prejudiced by this conclusion; for the act of 1829, by which their claim was confirmed, authorizes, in fact, contemplates, such a survey as that which was made by Weakley.

In Hagan, et al. v. Campbell and Cleaveland, 8 Porter's Rep. 9, the Spanish title under which the plaintiffs below claim was before us, and the question of its eastern *terminus* most elaborately considered. We then held, that it not only extended to high-water mark, but that the north and south lines were to be continued without deflection to the channel of the river. This conclusion was attained upon a view of the terms of the grant, and the accompanying plat to which it referred, on which the lines were thus traced. By that decision, we are still willing to abide. [See also the Mayor and Aldermen of Mobile v. Eslava, 9 Porter's Rep. 577.]

What we have said renders it unnecessary to add any thing as to the power of Congress, to grant the shore of the navigable waters in this State, and the effect, in a political point of view, of the act providing for the admission of Alabama into the Union. We have, in the case last cited, expressed ourselves on these points. It will also be apparent, that the evidence excluded upon the plaintiffs' objection was irrelevant, and that there is no available error, either in the charges given, or in those refused. We have only to add, that the judgment of the Circuit Court is affirmed.

WILLIAMSON v. BRANCH BANK AT MOBILE.

1. Where an executor qualifies in Virginia, and there under the will takes possession of slaves, charged with a legacy, which he afterwards removes to this State, and there is no evidence of what are the laws of Virginia, the common law must be looked to, in order to ascertain the nature of the executor's title, and whether a purchaser from the executor can resist the claim of the legatee, to charge the slaves with her legacy.
2. When property is received by a foreign executor abroad, and it is afterwards remitted here, an administrator appointed here, cannot assert a claim to it here, against the person in whose hands it may be, or against the foreign executor.
3. A foreign executor, &c., is chargeable in this State for all the assets which he retains in his hands, or which he has disposed of, out of the course of his administration; and the legatee has the right here, to pursue the assets of the estate, so long as they continue to be held by the executor, or his personal representative.
4. Although an executor is invested with the absolute power to dispose of the personal estate of his testator, yet he can make no valid sale or pledge of the assets as a security for, or in payment of his own debt.
5. As between the executor and his immediate creditor, assets of the testator, may be seized and sold under execution, whenever there has been a devastavit; and when the executor has so dealt with the assets, as to be responsible for a devastavit, or has used them in a manner inconsistent with his trust, he cannot prevent his creditor from seizing them under an execution.
6. Where an executor holds assets in accordance with the trusts of the will, he may prevent a sale of them, when levied on for his own debts, by interposing a claim under the statute, and possibly by a bill in equity; but if the executor permits a sale to be made, it is a devestavit, and the purchaser under the sheriff cannot be said to be in collusion with the executor. [Opinion of GOLDTHWAITE, J. not concurred in by the other Judges.]
7. A creditor, or legatee, has the right to pursue the assets of an estate, whenever there is reason to apprehend their misapplication by the executor, either voluntarily, or by coercion of execution, in satisfaction of his own debts.
8. Where slaves of an estate upon which the executor administered in Virginia, were removed to this State, where for some years he had used them as his own, he being also the residuary legatee; which slaves were chargeable with the payment of a legacy of ten thousand dollars, and were levied on by the sheriff in this State for the debt of the executor—the legatee cannot pursue them in the hands of the purchaser, although notice was given at the sheriff's sale, of the claim, and that it would be enforced against the slaves. [Opinion of GOLDTHWAITE, J. not concurred in by the Court.]

9. Notice given at the time of a sheriff's sale of an unextinguished equity, is sufficient to charge a purchaser, and in this respect there is no distinction between sheriffs and other sales. [ORMOND, J. delivering opinion of the majority of the Court.]

Writ of error to the Court of Chancery for the —— district of the southern division.

THE case made by the bill is this: In September, 1836, William Chamberlayne, of the State of Virginia, then possessed of real and personal estates, died, having first made and published his last will and testament, by which, after some two or three other bequests and devises, he made the following: "I give and bequeath to my niece," the complainant, "the sum of six hundred dollars annually, to be paid by my executor, commencing five years from the day of my death; which said sum is to be applied to the best use, in his judgment, to promote her comfort and convenience. Should my said niece survive her husband, and prefer the sum of ten thousand dollars to said annuity, then my executor is required to pay the said sum in four annual instalments, the first payable in twelve months from her election. Should Samuel Williamson survive his wife," the complainant, "and she leave a child, or children, then my executor is in like manner constituted trustee to such child or children, and shall apply said annuity to the support of such child or children, till he, or they, arrive at the age of twenty-one years; and that in four annual payments he pay the said sum of ten thousand dollars, intended to have been paid to their mother, to such child, or children, in four annual payments." "I now give and bequeath to my beloved nephew," the defendant, Mosby, "all the rest and remainder of my estate, both real and personal in this State," (Virginia,) or "elsewhere, to him and his heirs forever. I lastly constitute and appoint my said nephew my whole and sole executor; and as there cannot be a reasonable doubt of my solvency, I request that he may not be required to give security as my executor." In a previous part of the will, is found this clause: "I wish my executor to keep my estate together four years, and manage it as he may think best, to raise the fund, together with all money that may be due, or owing to me, for the payment of such debts as he shall be satisfied are legal and

just; and at the end of that term he will deliver over to each legatee his legacy. And in twelve months thereafter, commence paying to, or for the use and benefit of, my niece," the complainant, "the annuity hereafter bequeathed to her during her coverture; and my executor is charged not to let one cent go into said Samuel Williamson's" (her husband) "hands, except such as he may apply to the purchase of provisions for the use and support of the said Elizabeth," (the complainant,) "and her children." At the bottom of the will, is a memorandum, signed by the testator; he directs that if his niece dies before her husband, and her child, or children, before they arrive at twenty-one years of age, his executor is released from the payment of the legacy.

This will is without witnesses, and was admitted to probate in the proper Court of Ordinary, in Virginia, on the 8th September, 1836, when letters testamentary were granted to the defendant, Mosby, upon his giving his own bond, without any security.

Under the letters testamentary, thus granted, Mosby took possession of the testator's estate, and the bill charges that all the debts and other legacies have been paid by Mosby, but that the one to the complainant has never been paid, in any manner, although payment has frequently been urged and requested.

Thirty slaves of the testator's estate, whose names are set out, were brought by Mosby to the State of Alabama, without the consent of the complainant, where, in Sumter county, on the 9th day of May, 1842, they were levied on, by the sheriff of Sumter county, and sold as the property of Mosby, to satisfy his own proper debts, and not for any for which he was liable as the executor of the testator. These slaves were purchased by the defendant, Sheppard. These slaves are charged to have been, at the time of the sale, and purchase by Sheppard, assets in the hands of Mosby, as executor, and subject to the payment of the legacy bequeathed to the complainant, and were not subject to the proper debts of the said Mosby, until the payment of that legacy. It is also charged that Sheppard was informed at the sale, that this legacy was unpaid—that the slaves were subject its payment, and would be pursued into the hands of the purchaser. It is also charged, that

Mosby and Sheppard are insolvent, and that there is reason to apprehend the latter intends removing the slaves out of the State.

The prayer is, that Sheppard may be restrained from moving the slaves out of the State, and for such relief as may be proper, under the circumstances of the case.

Sheppard answers the bill, and states his ignorance of the will of Chamberlayne, and calls for proof. He insists, that Mosby came to this State in 1836 or '37, possessed of a large number of slaves, upon which he obtained credit, as their ostensible owner; that a large sum of money was due from him to the Branch Bank of the State of Alabama at Mobile, for debts contracted on the credit of the property thus in his possession, and that, as the agent of this Bank, he made the purchases charged in the bill. He admits that notice was given at the sale, of the non-payment of the legacy, and that the complainant intended to pursue them into the hands of the purchaser, but he insists, that this was only part of a fraudulent contrivance to secure the property, and prevent it from being appropriated to the discharge of the debts of Mosby. A variety of facts are detailed to support this allegation, but it is unnecessary to state them here, as no evidence was taken to sustain this point of the answer.

A supplemental bill was filed afterwards, making the Branch Bank of Mobile a party, and alledging another sale by execution, at which thirty slaves were sold, and purchased by the Bank, under like information and notice.

Testimony was taken by the complainant, which identifies the slaves sold as having been owned, or as being the issue of those owned by the testator. That Mosby removed from Virginia in 1837, bringing the slaves with him, and that ever since they have remained in his possession, until the sale under sundry executions against him individually. The will was established by the production of a properly certified copy of the probate. No evidence was taken by the defendants.

By agreement between the parties, the answer of Sheppard was to be considered as the answer also of the Bank, and it was agreed also, that the will had never been recorded in any Court in Alabama.

The Chancellor considered, that the slaves purchased for, or

by the Bank, were subject to the complainant's lien for the legacy, bequeathed to her by the testator's will, and decreed that they were so subject, but allowed the Bank to elect to hold the slaves, securing the legacy according to the terms of the bequest.

This decree is now sought to be reversed.

F. S. Lyon, for the plaintiffs in error, made the following points:

1. If the will operated as a lien upon the slaves, it should have been recorded in Sumter county. [Clay's Digest, 255; Swift v. Fitzhugh, 9 Porter, 39.]

2. The complainant, as a pecuniary legatee, has no right to subject the slaves, against a purchaser for a valuable consideration, without showing fraud, collusion, or misconduct between him and the executor.. [1 Lomax on Ex. 346; Hall v. Sampson, 7 Vesey, 152; 17 Vesey, 16; 14 Ib. 355; Field v. Scheffelin, 7 John. Ch. Rep. 150; Sutherland v. Brush, 7 John. Ch. 17; 9 Cowen, 320; 2 Rand. 294; 3 Ib. 195; 4 Porter, 27; 1 Lomax on Ex. 346; Whale v. Booth, 4 T. R. 625.]

3. There is no equality or equity in pursuing the slaves purchased by the Bank, when the property unsold, and that purchased by others at the sale, was equally liable to the legacy. [1 Story Eq. 778; 1 Vern. 455; Amb. 614; 9 Ves. 209.]

4. There is no proof that the slaves mentioned in the supplemental bill, ever belonged to the estate of Chamberlayne, and none showing that they are subject to the complainant's legacy.

Hopkins and Reavis, contra, insisted—

1. That in order to protect the claimant's rights, it was unnecessary for the will to be recorded. The statute only relates to cases where there is a contract, by which the title is in one person and the possession in another. It presumes the incumbrance to be created by the party owning the property, and the instrument creating the incumbrance to be in the power of the parties beneficially interested. [Swift v. Fitzhugh, 9 Porter, 37.] Here the instrument was neither in the power of the legatee or of the executor, (1 Rev. Code of Vir. 381, § 27,) and our statute does not authorize the registration of a copy.

2. The slaves were not liable to be taken for the executor's debts until the debts and legacies were paid. [4 Term, 621; 1 B. & P. 293; 17 Ves. 152; 5 Ala. Rep. 523.]

3. So far from the slaves being liable to be taken for the executor's debts, if he had made an actual sale or mortgage of them to the Bank, and that had notice at the time of the complainant's equity, the slaves would still be chargeable with the legacy. [4 Porter, 27; 4 Dess. 522; 17 Vesey, 152; 1 Cox, 320; 11 S. & R. 377; 2 Rand. 290; 12 Wheat. 498.]

4. The second section of the statute of frauds, (Clay's Dig. 255,) relates to conveyances and wills made in this State only. This is evident from the mode of proof and registration required [13 Pet. 107; Crenshaw v. Anthony, Mar. & Yerg. 110.]

5. There is a wide difference between a sale made by an executor, of the testator's assets, in payment of his own debt, and a sale of them under an execution, to pay his own creditor. In the first, having the legal title, he voluntarily parts with it, committing a devastavit without the connivance of the creditor; in the other, if he is not consenting to the sale, the effect of it would be, that the law will permit a creditor of the executor to waste the estate, without being responsible to any one. The case of Whale v. Booth is determined on the ground, that the creditor did not know that there were debts of the estate unpaid, and that the executor had made a bill of sale.

6 Mosby stands in an attitude different from that of executor merely; he is constituted, by the will, a trustee, to hold the legacy for the complainant's separate use, and there is no rule more firmly established, than that a purchaser of trust property shall be held to account for it.

7. There is no proof that any one but the Bank or its agents purchased, but if there was, this would not make it necessary to make such purchasers parties. [Story Eq. Plead. 197, § 228.] The rule of contribution has no application between wrongdoers, as between whom there is no privity.

8. The slaves named in the supplemental bill were properly charged, as the agreement refers the answer of Sheppard to that, as well as the original bill.

9. The notice of the complainant's lien, is sufficient, if given before the purchase. [4 Porter, 27; 10 John. 458; 4 Wheat. 266; 9 John. 163.]

10. The legacy is a charge on the assets. [2 V. & B. 378; Ward on Leg. 206.]

GOLDTHWAITE, J.—1. In the consideration of this case, it is material to take into view the fact, that the will was executed in Virginia, where probate was granted; and where the executor, who is also the residuary legatee, obtained possession of the slaves now sought to be charged, and which were subsequently removed by the executor to this State, when they were taken in execution to satisfy his individual debts. It is also material to advert to the circumstance, that there is no evidence in the case showing what the laws of Virginia are, with respect to the powers and duties of an executor; if they vary in any manner from the rules ascertained by the common law. In this condition of the case, it seems evident to me, we must look to the common law, and not to our own statutes, to ascertain what is the nature of the title by which the executor acquired these slaves; and whether, under the circumstances of this case, the purchaser of the slaves can equitably resist the claim of the complainant, to charge them with her legacy.

2. I say, it seems evident, that we must look to the common law, independent of our own legislation, because it is well settled, that if property is received by a foreign executor or administrator abroad, and it is afterwards remitted here, an administrator appointed here cannot assert a claim to it here, either against the person in whose hands it might happen to be, or against the foreign executor, or administrator. [Story Conf. Laws, 434, § 518; 432, § 516.]

3. Though this is considered as well settled, and indeed depends on a maxim of very general acceptation, to wit: that the *state* or condition of property accompanies it every where, yet it by no means follows, as asserted by some decisions, (Story Conf. Laws, 422, § 513, and cases there cited,) that a foreign administrator can only be sued in the limits of the country which made the grant of administration. On the contrary, it has been held by Courts of high authority, that such an executor is chargeable in any country where he is found, for all the assets which he retains in his hands, or which he has, in that country, disposed of, out of the course of his

administration. [Swearingen's exr's. v. Pendleton's exr's, 4 S. & R. 389; Evans v. Tatum, 9 Ib. 252; Campbell v. Tansey, 7 Cowen, 64.] To this effect also, is the decision of our own Court, in Calhoun v. King, 5 Ala. Rep. 623. In that case, a foreign administrator had removed a portion of the assets of the estate here, when he died. After administration of his estate was granted, his administrator was enjoined at the suit of a distributee of the foreign estate, from selling assets of that estate which come to his hands under the administration; and it was further decided, that those assets could be distributed here under a Court of equity, notwithstanding the administration and possession of it in another State.

In view of these decisions, it may be considered as established, that the complainant is entitled to pursue the assets of the estate, so long as they continue to be held by the executor, or his personal representative, and that in this aspect, the case is not affected by the removal of the assets into another jurisdiction.

4. Beyond this, it seems now to be the constant doctrine of the English Courts of equity, that although an executor is invested with the general and absolute power to dispose of the personal estate of his testator, yet, generally speaking, he can make no valid sale, or pledge of the assets, as a security for, or in payment of his own debts. [Williams on Ex. 612, and cases there cited.] Sir John Leach, in Keane v. Drummond, 4 Madd. 332, thus states what appears to be the result of all the cases: "Every person who acquires personal assets by a breach of trust, or devastavit in the executor, is responsible to those who are entitled under the will, if he is a party to the breach of trust. Generally speaking, he does not become a party to the breach of trust by buying, or receiving, as a pledge, for money advanced to the executor at the time, any part of the personal assets, whether specifically given by the will or otherwise: because this sale, or pledge, is held to be *prima facie* consistent with the duty of an executor. Generally speaking, he does become a party to the breach of trust, by buying, or receiving in pledge, any part of the personal assets, not for money advanced at the time, but in satisfaction of his private debt, because this sale, or pledge, is *prima facie* inconsistent with the duty of an executor." He says, he prefaces

both those propositions with the terms, "generally speaking," because they both seem to admit of exceptions. It is also very clear, that whenever there is such collusion between the executor and the person in possession of the assets, as will render the dealing between them invalid, creditors and legatees, whether general or specific, are entitled to follow the assets. [Hill v. Simpson, 7 Vesey, 152; McLeod v. Drummond, 17 Vesey, 169.] And the rule has been extended so as to include an administrator *de bonis non*. [Cubbidge v. Boatwright, 1 Russ. 549.] Whether, and how far delay to enforce these rights, within a reasonable time, will operate as a bar, need not at present be considered.

5. It will be perceived, that the Bank does not stand in the attitude of a purchaser from the executor, but is a purchaser under a sale, made by the sheriff, by virtue of sundry executions against the executor individually. The authorities, therefore, which have been examined, do not bear upon the case, if the sheriff, under the executions in his hands, was authorized to convey the title to these slaves: or unless the purchaser can be charged as being in collusion with the executor in causing a *devastavit* of the assets, by reason of the notice given by the complainant at the sale. If the sale by the sheriff was illegal, and conveyed no title to the purchaser, as the complainant insists here, was the case, it being shown that her legacy remained unpaid; there would, in my judgment, be an end of the controversy; because we have already ascertained, that as assets of the estate, the slaves would be chargeable with, and subject to the payment of complainant's legacy.

The cases at law bearing upon the question of the authority of the sheriff to levy and sell, are Whale v. Booth, 3 Doug. 36, S. C. very imperfectly reported in a note, 4 Term 625; Farr v. Newnham, 4 Term 621; Quick v. Staines, 1 B. & B. 293; Gaskill v. Marshall, 5 C. & P. 31, and Fenwick v. Laycock, 2 A. & E. N. S. 108. The four first of these cases, were actions against sheriffs for false returns; or for seizing or converting personal effects. The last is the interposition of a claim by a trustee, under a recent act of Parliament, and is in the nature of our claim suits. In Whale v. Booth, the sheriff had seized goods of the testator upon an execution against the executor individually, and turned them over to a trustee

of the creditor upon an inventory; at the same time he executed a bill of sale. The creditor knew that some of the goods were parcel of the estate and effects of the testator. The goods were put in the possession of one Mansfield, and the executor came to live in his family as a servant of the creditor. The plaintiff having obtained an execution against the goods of the testator in the executor's hands to be administered, caused the same goods to be seized; but the defendant returned the execution *nulla bona*, under the impression that the property in the goods was divested by the previous sale. The question was, whether the executor had so far conveyed the goods of his testator, as to deprive the plaintiff of his right to levy on them. Lord Mansfield conceded, that the executor might have defeated the seizure by the sheriff; but as he did not, he consented to the execution and sale; and the case could not, as he said, be distinguished from an alienation by the executor. The bill of sale acquiesced in by the executor, is the same thing as a direct sale by him. The sale by the sheriff was accordingly held good. Farr v. Newnham, was a question, whether, after a levy upon assets of the testator for satisfaction of a debt of the executor, the sheriff was warranted in giving precedence to an execution, afterwards placed in his hands, against the goods of the testator. The Court, three Judges against Judge Buller, held, that he was thus warranted. In Quick v. Staines, the executrix, for three months from the death of her testator, had used the goods as her own, and then married; after which, the husband and wife used the goods as their own. They were levied on and sold as the goods of the husband. He and his wife afterwards sued the sheriff in trover for the conversion, but the Court of Common Pleas held, that after a *devastavit* he could not be permitted to set up the claim of his wife as executrix. In this case, only nine months had elapsed between the testator's death and the suit against the sheriff. It seems, at first, to have been considered, that the case of Farr v. Newnham was inconsistent with that of Whale v. Booth, though two of the three Judges gave the latter case their express assent. This seems also to have been the opinion of Lord Eldon, who, in McLeod v. Drummond, 17 Vesey, 154, says, he is not prepared to follow Lord Mansfield even to that extent, and even insists, that the opinion of

the Judges in Farr v. Newnham, could not be squared with equitable notions. Afterwards, however, in the same case, he says, that the decision of Lord Mansfield, as that of a Court of law, may be considered as general doctrine. Gaskill v. Marshall was an action of trespass against a sheriff for selling goods which the plaintiff had in his possession as administrator. The only proof of a *devastavit* was, that the administrator had removed with his wife to a house occupied by the intestate before his death, in which was the furniture, for seizing which the suit was brought. Lord Tenterden thought, that the plaintiff had not been so long in possession, as to make these goods his own. Three months only had elapsed; but the Judge said, that it might be otherwise, if the possession had continued for a very long time. In Fenwick v. Laycock, the defendant in execution was in possession of goods as the trustee of another; and although his possession had continued for a long time, it was consistent with the terms of the trust. Lord Denman held, that the goods were not subject to the levy, and laid some stress upon the possession being necessary for the execution of the trust.

When these cases are exhibited at one view, it seems evident to me, they do not conflict: and the supposed inconsistency between the two principal cases, in the opinion of Lord Eldon, may have been caused by the imperfect note of Whale v. Booth, in Term Reports. Conceding, however, the utmost weight to his remarks, with reference to that case, they amount only to the expression of difference of opinion, in which the matter to be decided by him was not involved. It may be remarked, too, that in the case before him there were circumstances of collusion between the executor and creditor, which possibly ought to have weight in a Court of Chancery. The general doctrine is distinctly admitted in all the cases cited, that as between the executor and his individual creditor, assets of the testator may be seized and sold under execution, whenever there has been a *devastavit*. It is impossible, not to see, that there must be a time when the goods held by an executor, may be chargeable with his individual debts. Preston, in treating of the conveyance of a term by an executor, says, that it is difficult to ascertain when the character of executor or administrator ceases, and the ownership, independent of

that character, commences. Every case must depend upon its own circumstances: this only is certain, that when the executor or administrator ceases to hold, in that character, he will hold the same in his own right, and the estate will then be subject to merger. [3 Preston on Con. 316.]

The case of Ray v. Ray, Coop. 264, decided by Sir Thomas Plumer in 1815, is very similar in principle to that now before us. There, an executor had renewed a term in his own name. This term was levied on by his individual creditor; and then a creditor of his testator filed a bill, praying for an injunction, and that the term might be made subject to his demand. The will was proved in March, 1809, and the bill filed in April, 1815, but it is not stated when the lease was renewed. The Court considered, that a debt contracted upon the credit of having property in possession for six or seven years, without any demand to enforce the constructive lien, had at least, an equal, if not superior, equity, to a creditor lying by, until the seizure of the goods under execution. And he accordingly dissolved the injunction, so far as it interfered, to prevent the sheriff from proceeding to sell. To me, these cases are satisfactory to show, that whenever the executor has so dealt with the assets, as to be responsible for a *devastavit*, or has used them in a manner inconsistent with his trust, that he cannot prevent his creditor from seizing them in execution.

6. It is difficult to suppose a more clear case of *devastavit* in an executor, than his permitting the estate committed to his charge to be sold for the payment of his own debts; and if he does so permit, it is entirely equivalent, so far as the common law is concerned, to a sale by himself. A creditor has the right to pursue the assets, when the executor, contrary to his trust, has converted them to his own use, and in doing so he cannot be said to be in collusion with him.

I entertain no doubt whatever, as to the right and capacity of an executor who holds the assets of an estate, in accordance with the trusts of the will, to prevent a sale of them when levied upon, by interposing a claim under the statute, and possibly too, by bill in equity. It deserves consideration also, whether, in a case where there had been no *devastavit*, or undue delay in the administration of the assets, the sheriff

or plaintiff in execution might not be responsible to the executor in his representative character.

7. The cases already examined, as well as others which we cite, show, that a creditor or legatee has the right to pursue the assets, whenever there is reason to apprehend their misapplication by the executor, either voluntarily or by the coercion of an execution, in satisfaction of his own debts; and that in all that class of litigation, it would be a proper subject of inquiry between the parties claiming to subject the property, whether the one or the other had the paramount equity. The cases of Pistole v. Street, 5 Porter, 64, and Wier v. Davis, 5 Ala. Rep. 442, show, that neither the creditor nor the administrator himself can reach assets at law, when they have been sold by the administrator, although such a selling may in itself be a *devastavit*. The decisions in Whale v. Booth, Quick v. Staines, and Ray v. Ray, before cited, are also conclusive to show that, by the common law, the property is altered by a sale under execution, and assets thus sold cannot be reached by a creditor of the testator in the hands of a purchaser at the sheriff's sale, if he is innocent of collusion with the executor. My own conclusion on this point of the case is, that under the circumstances disclosed by the bill, the slaves were *prima facie* liable to seizure upon executions against the defendant, Mosby, individually, and that a purchaser at the sheriff's sale, if unaffected by fraud or collusion, was invested with the absolute title, by virtue of such sale.

8. I shall now examine the case with reference to the supposed liability, on account either of an actual or constructive collusion. Actual collusion with the executor is not asserted by the bill, or disclosed by the answer or evidence. It is not even stated in the bill, that the executions under which the sales were made, were at the suit of the Bank. The answer, it is true, sets out the purchase and assignment of various judgments, the executions upon which were supposed to have a preference of lien, in consequence of being first in the sheriff's hands, and the evidence discloses a sale under various executions, to the amount of $22,454. The charge of collusion therefore, rests entirely upon the circumstance, that at the time when the sheriff was about to sell, notice was given to the persons then attending, of the fact, that the complainant's legacy

was unpaid, and that purchasers would be held responsible. It is difficult to conceive that such a proceeding as this could have any other effect than to invite and encourage fraud. If her claim was available as against the several creditors, no reason is shown why it was not interposed in such a manner as to enable them to contest its validity; and it is equally difficult to assign a satisfactory reason why she should prefer to pursue a great number of purchasers, at the risk and hazard attendant upon such a suit, in preference to proceeding at once against the executor, before the levy, or against him and the creditors, after the seizure, but before the sale. To me it seems obvious, if such a notice can affect the purchaser, with notice of a constructive lien, that the sale of the slaves, instead of being in some degree under the control of the parties to the execution would have been entirely so, under that of the complainant. A purchaser satisfactory to herself, would meet with no impediment, whilst one who was not so, would reap a law suit, as the only result of his investment. The inevitable consequences of giving effect to such a notice in this case, would be, either to delay, hinder, or defraud the creditors, who must now be presumed as rightfully pursuing their demands, or to enable her to nominate a purchaser at her own price. Even in cases where, in consequence of a collusive purchase from an executor, the sale would, under ordinary circumstances, be set aside, a waiver has been presumed from lapse of time. [Elliot v. Merriman, 2 Atk. 41; McLeod v. Drummond, 17 Vesey 162; Ray v. Ray, Coop. 264.] Here in addition, the fact that all other debts and legacies are asserted by the bill to have been paid, the property is removed into another State, where it remains for nearly five years, and even when levied on, no claim is interposed by the executor, in his representative character, nor any proceedings taken by the complainant to assert her claim to charge the assets. Under these circumstances, if the suit was now to restrain a creditor of the executor, from proceeding, to me it would be difficult to arrive at a conclusion, that his equity was inferior to that of the complainant, after such delay. But when the creditor has been suffered to proceed, without one legal impediment, with the levy and sale, I think it is too late then to affect a purchaser with notice of a

claim which should have been asserted against the creditor, who alone is competent to litigate it.

My judgment leads me to the conclusion, that the bill discloses no substantial equity, and ought to be dismissed, but my brothers attain a different result, which they will announce.

ORMOND, J.—I agree with my brother GOLDTHWAITE, in the positions advanced in this case, except so far as he maintains, that the equitable lien of the complainant was lost, by her omission to assert it by a suit in Chancery, before a sale of the slaves. I understand the doctrine to be well settled, that a purchaser, with notice of an existing equity, takes subject to such equity, and I know of no case which holds that there is any difference as to this point, between a purchaser at private sale, or a purchaser under execution, or at any other public sale. If there be notice before the purchase is consummated, the purchaser is affected by it, and will take the property subject to the *lien* or equity. This is a familiar principle of Courts of Equity, which it is scarcely necessary to cite authority to sustain, and which has been recognized by this Court. [Swoope v. Trotter, 4 Porter, 27; Hall v. Click, 5 Ala. Rep. 363.]

Nor is there any *laches*, or delay, imputable to the complainant. The will was made and became operative in September, 1836. The bill was filed 10th May, 1842, so that the first annuity was just payable when the bill was filed. It is true, if the executor was about wasting the estate, so as to endanger the annuity, she might have filed a bill *quia timet*, but there is no evidence that she knew the executor was becoming involved, or that her legacy was about being put in hazard. The case of Aston v. Galloway, et al. 4 Iredell Law & Eq., on Eq. side, 126, is a strong case in point. There, a testator devised land, charged with the payment of a legacy, which was afterwards purchased by Galloway, with notice of the equity, and retained possession for twelve years, when he died, and his executors, under a power in his will, sold to another. A bill was filed against the executors of Galloway, and the last purchaser, and the Court decreed payment of the legacy, from Galloway's executors, although at the time of filing the bill, there wanted but three days of the time when the statute of limitations would operate as a bar to relief.

The executor had a clear legal title in the slaves, and that title, (charged with the payment of this annuity, and subject to the payment of ten thousand dollars to the legatee, if she survived her husband, and so elected,) was liable to sale, for the payment of his debts. In this aspect, this case is materially different from that of Ray v. Ray, Cooper's Rep. 264. The ground of that decision is the long delay of the creditor of the deceased, in permitting the executor to retain and use the property as his own, and during the interval, about seven years, the executor had changed the character of the property, (a leasehold of the estate,) by renewing the lease in his own name. Under these circumstances the Court considered the equity of the creditor of the executor, equal, if not superior, to that of the creditor of the deceased, and refused to interfere to prevent a sale of the property for the executor's debts.

In this case there has been no delay—the first instalment of the annuity was not long due when the sale was made, and all that could be reasonably required of the complainant, was to give notice as soon as the slaves were levied on, of her equitable lien. The difficulty which appears to have pressed upon my brother is, that if notice merely was sufficient, it would enable the complainant, by creating doubts about the title, to nominate her own purchaser, and thus covertly, either herself, or through the medium of another, to buy in the property, at a reduced price. But we cannot assume that such was her intention, or that such would be the necessary consequence of her acting, and there can be no doubt that such a design consummated, would be a fraud upon the creditors, which could be reached in this Court.

If, indeed, she had filed a bill to prevent the sale, it must have been upon the allegation that her legacy was thereby endangered, and that object can as well be accomplished now, that by the sale the Bank has become the owner of the property, with notice of her rights, as it could have been before the sale. Certainly the Bank is in as good a condition now, as it would have been then; as it cannot be supposed that the notice of the *lien* could have had any other result than to affect the value of the property, in all probability, at least to the extent of the *lien*.

I am not able to perceive that the complainant has been

guilty of any laches which could either prejudice her rights, or injuriously affect the rights of the creditors of Mosby, and the Bank having purchased with full notice of her equitable *lien*, must take the property subject thereto.

The decree of the Chancellor should therefore be affirmed.

COLLIER, C. J.—It may be conceded, so far as this case is concerned, that an executor may so act in respect to the estate of his testator, as to subject it to levy and sale for the payment of his individual debts. Without stopping to consider what the law is upon this point, I am satisfied that the complainant had an equitable lien upon the estate of the testator for the payment of the legacy, bequeathed her by his will. I have considered the argument of my brother GOLDTHWAITE, and acknowledge its force, yet I find myself unable to concur in the conclusion, that the complainant, by failing to invoke legal coercion before the sale was made under the execution of the Bank, lost her lien upon the property sold. In general it may be necessary for a *cestui que trust* to protect his rights against one proposing to purchase *bona fide*, and for a valuable consideration; but if one purchases with notice, he cannot hold the property divested of the trust. He will not occupy a more favorable position than the trustee, but will be treated as such. The complainant is a married woman, and it is not perhaps altogether certain, that even a notice would be necessary for the protection of her interest. But be this as it may, if she has given notice, her rights are unaffected by the sale. I am therefore of opinion that the decree should be affirmed.

MARTIN, ADM'R. v. BALDWIN.

1. Where an insolvent estate was in process of being audited, at the time of the passage of the act of 1843, for the settlement of estates in the Orphans' Court, the law previously existing will govern and control it; but where the initiatory steps only have been taken, the proceeding so far as it has progressed, will be governed by the former law, but so far as subsequent action is had, it must conform to the act of 1843.
2. The provision in the act of 1843, authorizing a writ of error, by, or against a single creditor, applies only before the final settlement of the estate; after final settlement, a writ of error must be prosecuted in the name of, or against all, the creditors.
3. Six persons drew a bill of exchange, upon which the money was received by them, and at the same time executed an instrument, in which they recited, that the bill was drawn for the mutual benefit of all the parties to it, and agreeing, that each would bear an equal proportion in its payment, each paying his separate portion;—one having been compelled to pay all, and three of the parties being insolvent: *Held*, that each was surety for the others, for all above his own interest in the bill, and co-sureties, for all above the sum they were individually liable for; that therefore in this proceeding the one, who had paid the entire debt, could recover of one of the solvent parties, one sixth part, being the part for which he was individually responsible, and one-third part of the portion of the three insolvent parties, making in all, one-third part of the entire amount.

Error to the County Court of Montgomery.

THIS was a proceeding upon the settlement of the estate of Joseph Fitzpatrick, which had been declared insolvent on the 23d November, 1842, to ascertain the validity of a claim presented against the estate, by W. O. Baldwin. The administrator moved to dismiss the claim, because it was not verified by affidavit, which the Court overruled, because the claim had been filed pursuant to an order of the Orphans' Court, made on the 23d November, 1842, requiring creditors of the estate to file their claims by the first Monday in September, 1843, and that this was filed in office on the 1st June, 1843.

The claim presented, was in the following words: "We, the undersigned, having this day made a bill of exchange,

dated even date hereof, drawn by Edward Hanrick, and accepted by William O. Baldwin, and indorsed by Peter C. Harris, Joseph Fitzpatrick, J. W. T. Reid, A. Fitzpatrick, and M. A. Baldwin, payable at the Union Bank of New Orleans. Now, in consideration, that the said bill was drawn and executed for the mutual benefit of each one of the parties whose names are thereto attached, it is understood and agreed between us, and we do further bind ourselves by these presents, that we will bear our equal proportion in payment of said bill, and that each one of us will pay his separate equal portion of said bill. Given under our hands and seals, this 29th October, 1839;" which was signed and sealed by all the parties. The claimant proved, that W. O. Baldwin, the acceptor, had paid and discharged the full amount of the bill of exchange, and that Hanrick, Harris, and Reid, three of the parties to the bill, were insolvent.

The administrator pleaded payment, and the cause being submitted to a jury, he insisted, that his intestate was liable only for one sixth part of the amount; but the Court charged, that the claimant was entitled to recover one third part of the amount, to which the administrator excepted. Judgment was rendered for $659, to be entitled to a pro rata dividend, when the estate shall be audited.

Afterwards, the Court directed the administrator to pay $48 76, the *pro rata* dividend, on said claim.

The errors assigned are, the refusal to dismiss the claim, and the charge of the Court.

A. Martin, for the plaintiff in error.

Hayne, contra.

ORMOND, J.—The objection to this claim, because it was not filed pursuant to the act of 1843, (Clay's Dig. 194,) and and verified by affidavit, cannot prevail. The estate was declared insolvent, and the order for filing claims against the estate, made previous to the passage of the act just cited, it must therefore be governed by the law then in existence, which did not require such verification.

From the instrument offered in evidence, it appears, that the bill of exceptions therein recited, was drawn for the joint ben-

efit of all the parties to it, and that each one, was interested in it, and entitled to an equal share of the proceeds. As each one of the parties to it was individually responsible for the whole amount, it results necessarily, that each was surety for the others, for all above his own interest in the bill; they were therefore, co-sureties for all above the sum, they were individually liable for. The acceptor having been compelled to pay the entire amount of the bill, has the right to recover in this action, the share of the plaintiff's intestate, which is one sixth part, and as it appears that three of the parties are insolvent, the estate is also liable for one third part of the amount for which, if solvent, they would be responsible, making in all, one third part of the entire amount, as the Court charged.

It appears, that this estate was reported insolvent previous to the passage of the act of February, 1843, to amend the laws in relation to insolvent estates, but the proceeding upon this claim, was had under the authority of that act, in virtue of which, also, this writ is prosecuted. As the law stood previous to the passage of the act of 1843, no writ of error could be prosecuted until after the final determination of the cause, and then by, or against, all the parties to the suit. [Cawthorne v. Weissinger, 6 Ala. 714.] By that act, (Clay's Dig. 195,) a writ of error may be prosecuted by a single creditor, whose claim has been in whole, or in part, rejected; or by the administrator, if improperly admitted, within twelve months after the decision. But we are very clear, that a writ of error cannot be prosecuted, by, or against, a single creditor *after the estate has been finally settled;* but that it must then be presented in the name of, or against all the creditors. In no other way, could the unity of the case be preserved, which might otherwise be split up into a hundred fragments. In this case, it does not conclusively appear, that the estate is finally settled, though there are some facts stated, from which such an inference might be drawn.

In the previous part of this opinion, it is stated, that the claim did not require to be verified, as it was filed under an order made previous to the passage of the act of 1843, although all the subsequent proceedings appear to have been had pursuant to the last act. The two acts must be reconciled, so as not to conflict with each other; where claims have been

in process of being audited, at the time of the passage of the last act, it is obvious the former law must apply; but when, as in this case, the initiatory steps, only have been taken, the proceeding, so far as it has progressed, must be governed by the former law, but so far as any subsequent action is had, it must conform to the act of 1843.

The result of this examination is, that there is no error in the judgment of the Orphans' Court, and it is therefore affirmed.

THE PLANTERS AND MERCHANTS' BANK OF MOBILE v. WALKER, ET AL.

1. Where a Court of law in which a party has instituted an action, upon the allegation that a suit pending in equity is for the same identical cause, makes an order that he elect, whether he will proceed at law, or in Chancery; such order will not be conclusive of the case in Chancery, but the Chancellor will be free to exercise his own judgment upon the motion to elect: and this, although a forced election shall have been made and entered of record at law.
2. The bill alledged that several conveyances were made by the defendants to a judgment at law, of all their visible property, that several of these conveyances were fraudulent in their inception, that others were either conceived in fraud, or held up with the view of delaying or defeating the creditors of the grantor: *Held*, that these allegations were sufficient to give to a Court of equity jurisdiction of the cause.
3. Where executions are levied on property, which the defendant in execution had sold and mortgaged, the plaintiff may notwithstanding go into equity in order to vacate the conveyances *in toto;* the only effect of the levies on the remedy in Chancery, would be, upon the interposition of a claim of property, to compel the plaintiff to elect (if the matters in controversy were identical,) whether the suit should be prosecuted at law, or in equity.
4. Although it may be necessary to entitle a judgment creditor to come into equity to subject the equitable estate of his debtor, that he should have pursued his legal

remedies to every available extent, without being able to obtain satisfaction; yet he may file his bill, upon the assumption that the defendants in execution have made several gratuitous or voluntary transfers of property, with the intent to *delay, hinder or defraud creditors:* or where, admitting the conveyances were made to secure debts which have since been paid, they are now held up to enable the grantor to defraud his creditors.

5. In a bill to set aside and avoid conveyances of land, slaves, &c., upon an allegation of fraud, it appeared that the grantors were in debt, and believed to be insolvent at the time the deeds bear date; each of the grantors conveyed his entire visible estate; the one to his father-in-law, the other to his brother in-law; the one on the payment of the purchase money in ten annual instalments, the other on payments to be made at different periods, the last of which was twelve years after the sale; in the one case the use of the lands and the employment of the slaves, would enable the purchaser to pay the stipulated price in six or eight years, in the other in eight or ten years. The father-in-law said his object in making the purchase was to save the property, and he thought he could make it pay for itself on the credit obtained. After the sale, the son-in-law acted professedly as the overseer of his vendee. Since the sale by the brother-in-law he has exercised a control over blacksmiths and shop, over wagons and teams employed in hauling wood from the plantation for sale, all of which are embraced by his conveyance; but the vendee has employed overseers on the plantation. In respect to both it may be said, that the vendees have shipped the cotton crops growed on the respective plantations to market. The witnesses know of no change of property from either of the vendors; they each live where they did at the time of their sales, have their carriages, house servants, &c.—and live in the neighborhood of each other: *Held*, that both conveyances were made "to delay, hinder or defraud" the creditors of the respective vendors and must be set aside.

6. Joint judgments were recovered by the complainant against the defendants, G. W., J. H. W., and R. L., all of whom it was alledged in the bill, united in a fraudulent purpose to defeat the collection of these judgments—the two former made absolute sales, professing to pass the possession and property to their respective vendees—the latter executed mortgages. All these transactions are charged to have been fraudulent, not only on the part of the defendants in the judgment, but of their vendees and mortgagees: *Held*, that as the defendants in the judgment had a common interest in its satisfaction, and are charged with a joint participation in a design to defraud, which led to the supposed fraudulent tranfers, a bill which makes them all parties, and seeks to set aside their respective conveyances, is not multifarious.

7. An application to continue a cause in equity, addresses itself to the discretion of the Chancellor, and however unwisely exercised, cannot be revised in an appellate Court.

8. When at the time a commission to examine witnesses issued, but one of the defendants had answered, and his counsel were duly notified of the time and place when the commission would be executed; the other defendants were in default, and a decree *pro confesso* had been rendered against them: *Held*, that the defendants who were in default cannot insist upon the want of notice, but it was competent for the plaintiff, under the statute, to make out his case by testimony taken *ex parte*.

9. If a defendant who is in default afterwards answers, so that a decree *pro confesso* is set aside, depositions taken without notice to him while the decree was operative, will not become inadmissible evidence. The correct practice in such case is, upon the decree being set aside, for the defendant to move upon a proper showing for leave to take the depositions of the same witnesses at his own instance, and a commission could issue on such terms as would protect the complainant.

Writ of error to the Court of Chancery sitting at Hayneville.

On the 25th of November, 1842, the plaintiff in error filed its bill setting forth, that on the 24th of May, 1841, it recovered two several judgments against George Walker, John H. Walker, and Robert Lowe, on two distinct demands; one for $6,406 28-100, besides costs; the other for $6,464 11-100, besides costs. Each judgment was rendered on several promissory notes made by J. B. Wilkins, as principal, and the persons above named, together with Boling Smith, as sureties, on the 1st January, 1838.

Original and *alias fi. fas.* were issued on these judgments, and returned, "No property found." On the 16th of May, 1842, *pluries fi fas* were issued, and placed in the hands of the sheriff of Lowndes, with instructions to levy the same, if property could be found liable to seizure.

George Walker, John H. Walker, and Robert Lowe, have so artfully and fraudulently arranged and conveyed their property, both real and personal, that they have no title to the same in their own names; and they pretend to have no estate subject to levy and sale under execution. Other persons not parties to the judgments, assert that all the property of these defendants in execution, belong to them under conveyances thereof; and the sheriff consequently refuses to levy thereon.

The bill then alledges, that the defendants in execution have equitable interests, in choses in action, real and personal property, of value more than sufficient to satisfy the judgments, which the agents and attorneys of the complainants have been unable to discover, and reach by execution, in consequence of the fraudulent conveyances and covenous arrangements of themselves, their relatives and confederates. That about the 8th September, 1840, George Walker, for a fictitious or assum-

ed consideration of $8,200 00, conveyed a large body of land (which is particularly described in the bill) to his brother-in-law, David A. Steele; and about the same time, made a fraudulent conveyance of *all his personal property*, consisting of forty or fifty negroes, at the least, besides horses, mules, &c.

Further: about the time the two notes were made on which the judgments were rendered in favor of the plaintiffs, Wilkins, the principal, conveyed to George Walker, by way of mortgage to secure the payment of the same, about ten negroes. The mortgage authorized the mortgagee to sell the property to pay the notes, and another debt of a like nature, but for a less amount between the same parties. That shortly thereafter, George Walker sold nine negro men, (being the same mortgaged to him by Wilkins,) to J. H. Walker, for a sum not less than $9,000 00, who worked them profitably for several years without paying any thing for them; and then they permitted, and caused these slaves to be sold at a price much below the amount J. H. W. was to pay for them, and appropriated the proceeds to the payment of the smaller debt provided for in the mortgage.

The bill also states, that when the negroes were mortgaged, Wilkins transferred and delivered to Geo. W. and J. H. W., or one of them, a promissory note made by Messrs. King and Curry, amounting to more than $10,000 00, under an agreement, that the proceeds should be applied to any balance that might remain unpaid on the notes of which the plaintiff was proprietor. Messrs. K. & C. soon paid their note. This sum, with the proceeds of negroes sold, when added to the value of two others, which, it is alledged, continue in the secret service of G. W. and J. H. W., afforded ample means to pay the notes—all of which were furnished by Wilkins, the principal.

The complainant further states, that on the 27th September, 1840, J. H Walker sold a tract of land, (particularly described in the bill,) containing five hundred and eighty-five acres, for the pretended consideration of $6,000 00 This contract recites, not only the sale of the land, but also professes to dispose of sixty-eight negroes, and every thing else pertaining to his plantation and house, to his father-in-law, A. Borland. In consideration of which, Borland agreed to pay certain debts of J. H. W. give his notes for the balance payable at different

periods; the last of which, was to become due on the 1st of March, 1852.

It is also alledged, that Robert Lowe, on the 11th of March, 1840, under the pretence of securing to Messrs. Anderson, Willis, & Co., the sum of $4,000 00, conveyed to them certain negro slaves by way of mortgage, with a power of sale. On the 6th of June, 1840, he conveyed certain land, (particularly described in the bill,) and other slaves, to George Pylant, to indemnify him against the liability to pay certain debts for which he was Lowe's surety. This latter conveyance was, by way of mortgage, with a power of sale, for cash, or on credit, at public, or at private sale: it also provided, that after the payment of the debts for which Pylant was the surety, then the balance (if any) in his hands, should be paid to such creditors of Lowe as might present their claims.

The debts pretended to be secured by the mortgages to Willis & Co., and to Pylant, it is alledged, never had an existence, or if they had, it was for a much less amount than the mortgages recite; they have been fully paid off, and are now set up for the purpose of defrauding the creditors of the mortgagor. *Further*, if these mortgages were ever valid, they have lost their lien by the delay of the mortgagees to foreclose them, and the mortgagor's continued possession of the property mortgaged.

It is charged, that the defendants, Wilkins and Smith, have transferred all their estates—some of it, with the intention to delay, hinder and defeat creditors, and have no property that can be reached by the complainant's execution; and openly pretend to have nothing, &c. Other persons have long since claimed, and still continue to claim, all the property, that at any time belonged to either Wilkins or Smith.

The complainant also alledges, that J. B. Wilkins, Boling Smith, and J. H. W. have respectively filed their applications for the benefit of the bankrupt law.

It is further charged, that G. W., J. H. W., and R. Lowe, have each been permitted to remain in possession of the property conveyed by them respectively, to Steele, Borland, and Willis & Co., and Pylant; that the design of all the parties, was, to protect the property embraced by the conveyances from execution, and thus defeat the just claims of creditors.

G. W., J. H. W., and R. L., each, conveyed all the property they respectively owned, in the manner above stated.

All the parties whose names are mentioned as participating in the several transactions stated, are made parties to the bill; many very searching inquiries growing out of the case are addressed to them; and the bill prays, that G. Walker, J. H. Walker, R. Lowe, J. B. Wilkins, and B. Smith may come to an account, and they, and confederates be decreed to pay the amount of the judgment. In default of such payment, then all the estate, legal or equitable, to which either of them shall be entitled, in possession or expectancy, may be converted into money, and appropriated under the direction of the Court, to the payment of the judgments in favor of the complainant. *Further*, that a receiver may be appointed to collect and take charge of the money, choses in action, and other property that may be found liable to the plaintiff's executions, or to which either of the defendants, whose property is sought to be reached, may be entitled; that such receiver may be invested with all power that is usual, necessary and appropriate to the case.

There is also a prayer for general relief, and that an injunction issue restraining and forbidding each of the defendants, from assigning, or making any other disposition of the real and personal property, in possession or action, to which the plaintiff may be entitled, in order to satisfy its judgment; and also to restrain them from collecting any money, &c. *And, lastly*, that process of *subpœna* may issue, &c.

David A. Steele answered the bill on the 16th of December, 1842. He admits, that he purchased of G. Walker, eighty-two negroes, twenty-six mules, four horses, five wagons, a carriage, cattle, hogs, household and kitchen furniture, for the sum of thirty-seven thousand, eight hundred dollars: also, eleven hundred acres of land for the sum of eight thousand two hundred dollars. The prices agreed to be paid by him, he insists was a full and fair consideration for all the property purchased, and denies all fraud, or any intention to defeat the creditors of his vendor. He states, that he received a bill of sale for the personal property, and a deed for the land; the latter has been duly recorded, and both he has ready to produce.

Defendant admits, that the sale was upon a credit, and pay-

ment was to be made in annual instalments of three thousand, five hundred dollars, until all the purchase money was paid; and affirms, that he made and delivered to G. W. his notes payable accordingly. He states, that he has made many payments to his vendor, and his creditors; has paid eight of the notes, which he now has in his possession, besides paying money (amount not recollected) credited on some of the other notes. In addition to this, he has other demands against G. W. for money paid for him, which have not yet been adjusted between them, but which he is satisfied will be acknowledged to be just.

Two of the notes made by this defendant, he understands have been transferred to B. Mock. Several of the slaves purchased by the defendant of Walker, have been levied on as the property of the latter, to satisfy the execution described in the complainant's bill; the defendant has interposed a claim of property, and an issue is now pending in the Circuit Court of Lowndes to try the right to these slaves. The answer insists, that the complainant cannot proceed at law and in equity at the same time, and prays, that it may be put to an election; it is further insisted, that the answer may be taken as a demurrer to the bill.

The answer of Robert Lowe was verified on the 17th December, 1843. So far as it is necessary to recite it, it may be thus condensed: defendant admits that he had no property on which the plaintiff's execution could be levied, unless it was an equity of redemption in certain property he had mortgaged to Anderson, Willis, & Co. He admits, that the complainant's judgments were obtained on two promissory notes as stated in the bill.

Defendant also admits, that he was the owner of the slaves, land, and other property, as stated in the bill; that in March, 1840, he made the mortgage on the slaves to secure to A. Willis & Co., the sum of four thousand, three hundred and sixty-nine 27-100 dollars. In June, 1840, he conveyed the land and negroes to George Pylant, upon the trusts, and with the power recited in the bill. Defendant affirms, that these several conveyances were honestly made, to secure *bona fide* debts, and not with the design or intention to delay, hinder, or defeat his creditors. That the debts were not for less sums than those

mentioned in the mortgages. He admits, that the debt due by him to the Branch Bank at Montgomery, and intended to be secured in one of the mortgages, has been reduced to about one thousand dollars; and that, on the 20th of September, 1840, he paid to A. Willis ninteen hundred and six 39-100 dollars—these are all the payments made by this defendant, "or any one else for him, to his knowledge or belief."

Defendant admits, that he has been permitted by A. Willis & Co., and G. Pylant, to remain in possession of the property respectively conveyed to them; but without any secret understanding, or concerted design to prejudice his creditors, or benefit him. He denies, that he has equitable interests, choses in action, &c., on which there are no prior liens, subject to the complainant's execution.

Defendant alledges, that the complainant caused one of the executions referred to in the bill, to be levied on some of the slaves embraced by the mortgage to A. Willis & Co., and a claim of property being interposed, and a trial about to be had, he dismissed this suit so far as it related to the slaves then in controversy. He insists upon this as a bar *pro tanto*, and demurs to the bill for multifariousness.

A. Borland's answer was filed on the 1st January, 1844. He admits, that during the year 1841, and since, J. H. Walker had no visible property on which executions could be levied; that on the 27th of September, 1840, a contract for the purchase of his (J. H. W.'s) land, negroes, &c. was consummated; and that this defendant, in virtue thereof, became the proprietor of them. He denies, that he knew of suits pending, or judgments obtained against J. H. W., at the time the purchase was made, but he has since ascertained, that such was the fact. Defendant supposed, that he owed the debts designated in the contract, and some inconsiderable sums, when, in truth, there were judgments and executions outstanding, which operated a lien on the property; some of these the defendant has paid, and under others, five negroes have been sold, and five others adjudged liable to their satisfaction.

Defendant denies, that he intended to aid in defrauding the creditors of J. H. W.; admits that he purchased all his property, real and personal, subject to execution, with very inconsider-

able exceptions, and insists, that the price stipulated by the contract was real, and a fair equivalent for what he was to receive. He insists, that he took possession of the property immediately after his purchase, and employed and paid the overseers from that time with his own means, except as hereafter stated; and denies, that J. H. W. received and appropriated the rents, issues and profits to his own use.

It is admitted, that J. H. W. continued to occupy the house in which he resided at the time the contract was made; because defendant had no use for the house, and because Mrs. Walker was his daughter. For the latter reason he permitted the house servants to remain with the family of his vendor. The carriage, which was old, has, for similar reasons, been permitted to be used by them. The defendant further states, that the house servants referred to have been settled on Mrs. Walker, and that she now holds them under deed declaring her interest.

Defendant affirms, that he has paid large sums of money in extinguishment of the debts designated in the written contract, and substituted his own, and other paper for the residue. The aggregate of all which, amount to the sum of thirty-five thousand seven hundred dollars; besides many small sums not recollected. The cash value of all the property purchased by this defendant of Walker, was estimated by him at twenty thousand dollars, and on the terms stipulated, about thirty-two thousand. The answer is drawn out at great length; states the contract, the most of the debts paid and assumed, &c., with particularity.

In the answer, a demurrer to the bill is insisted on for multifariousness. Defendant also insists, that as some of the slaves were levied on to satisfy one of the executions, to which he interposed a claim, and an issue was made up, to try the right, and under an order of the Circuit Court, the plaintiff elected to dismiss the bill, so far as it related to the same slaves, it was bound by such forced election; and the defendant pleaded the same in bar *pro tanto* to this suit.

J. H. Walker's answer was filed on the 1st January, 1844. He declares, that the sale made of his property to A. Borland was *bona fide*, and for a full price; that the debts which his vendee undertook, by the writing, to pay for him, were justly

due to the persons therein named. Admits, that he did not inform Borland of his indebtedness, further than is shown by their contract, and his object in selling his property on time, was, that, it might yield a larger sum of money. He disclaims all intention of delaying, or defeating his creditors, adopts the answer of Borland, so far as it relates to the sale, condition of the property, &c., and demurs to the bill for multifariousness.

G. Walker's answer was filed simultaneously with that of the last named defendant. Like him he also demurred to the bill for multifariousness; insisted that his sale of property to D. A. Steele was made in good faith, for an adequate consideration, and without an intention to defeat or defraud his creditors. He adopts the answer of Steele, so far as it relates to their transactions with each other, the condition of the property, &c.

George Pylant died after the bill was filed; his death was suggested, and as to him the suit was suffered to abate. Publication was made, as to Boling Smith, and the members composing the firm of A. Willis & Co.—all of whom, it appears, were non-residents, and the other defendants being served with *subpœna*, and having failed to answer within the time prescribed by statute and the rule of Court, the bill, as to all the defendants (with the exception of Steele) was taken as confessed, in May and July, 1843.

Affidavits were filed by Borland, Steele and Lowe, stating, some of the slaves, in which it appeared, by the bill, they were respectively interested. had been levied on by one, or both the plaintiff's executions, that claims had been interposed to them, and issues made up pursuant to the statute, to try the right: thereupon, they moved that the records of the causes might be inspected by the Chancellor, and the plaintiff constrained to elect, (so far as the subject matter of the suits were identical,) whether it would proceed at law or in equity, and *pro tanto* dismiss the one suit or the other. The Chancellor overruled the motion, except as to Borland; as to him, the motion was sustained, under the impression, that a previous election made under an order of the Circuit Court was obligatory and conclusive, and had been so adjudged by this Court.

The defendant Steele, prayed the Court to grant a continuance of the cause, (after it was called for final hearing,) and

submitted an affidavit, setting forth facts that he could prove by witnesses, not examined, whose names he mentioned. Borland and Lowe also prayed a continuace, upon the ground stated by Steele, and for the additional reason, that they had not been served with a copy of the interrogatories on which the plaintiff's witnesses were examined, or been otherwise informed of the time and place of taking their depositions. The Chancellor held, that as a general appearance was entered by two solicitors who were practising in partnership, and one of them had accepted service of the interrogatories and received a copy of the same—*and further*, the bill being taken as confessed as to all the defendants but Steele, for a failure to file their answers, the motions for a continuance, and to suppress the depositions must be overruled.

The cause being submitted for hearing, the Chancellor was of opinion, that to entitle a judgment creditor to come into equity to subject the equitable estate of his debtor, or property which he has fraudulently sold and conveyed to others, he must have pursued his legal remedies to every available extent, without being able to obtain satisfaction of his judgment. This, he assumed, the plaintiff had not done in the present case, because the levies under the *pluries fi. fas*, were undisposed of—the trials of the right of property not being determined. The bill states the return of "no property found," to the *original* and *alias* executions, but does not show that the *pluries* had been returned; this, the Chancellor supposed, was a defect, fatal to the bill, even if the ground stated above did not appear from the answers and proof.

The bill was accordingly dismissed with costs.

R. Saffold, for the plaintiff in error, made the following points: 1. The order of the Circuit Court, requiring the complainant to elect whether it would proceed at law against Borland and Messrs. A. Willis & Co. was irregularly made, and should have been wholly disregarded by the Chancellor. [36 Rule of Chancery Practice, Clay's Dig. 616; Duvall's heirs v. McLoskey, 1 Ala. Rep. N. S. 708, 720, 748.] If the order of election was made in conformity to the rule and practice, it should be here vacated, because the suits at law and the bill in this case, is not for the same cause; but the latter is much

more extensive in its design, and embraces many subjects of litigation with which the former has no connection.

2. In respect to the equity of the bill, the complainant seeks to set aside certain conveyances alledged to be fraudulent, to discover and subject property, real and personal, choses in action, &c., in which the judgment debtors have expectant interests, and in respect to which secret trusts have been created for their benefit. All these matters are not cognizable at law. True, in respect to the mortgagor's equity of redemption, if they are in possession, this may be sold under the executions; or the validity of the conveyance of the personalty may be litigated at law. But the remedy in equity is not only concurrent, it is also more comprehensive; there, by a single suit all matters in controversy may be adjusted, and complete justice done to all parties concerned. [Magee v. Carpenter, 4 Ala. Rep. 469; Chambers v. Mauldin, Id. 477; P. & M. Bank v. Willis, 770; Livingston v. Kane, 3 John. Ch. Rep. 224; Storm v. Badger, 8 Paige's Rep. 130]

3. The return of the executions, "no property found," entitled the complainant to go into equity against equitable interests, to remove obstructions to the satisfaction of the executions, by levy and sale of property; as well as to reach other property against which there was no legal remedy. [Cuyler v. Moreland, 6 Paige's Rep. 274; 2 Hoff. Practice, 118, and cases there referred to, and on pages 117-9.]

4. The rule which requires that a plaintiff must have exhausted his legal remedies. before he can go into equity, to subject the equitable interests of the defendant to the payment of a judgment, interposes no objection to the bill in the present case. Here the plaintiff's executions were duly returned, "no property found," and the levies of the *pluries fi. fas.*, since an adverse claim has been interposed to the property seized, cannot impair the right to proceed in Chancery, which before became complete. Burk v. Brown, 4 John. Ch. Rep. 671, 676; Scriven v. Bostick, 2 McC. Ch. Rep. 410; Lucas, et al. v. Atwood, et al. 2 Stew. Rep. 378; Williams v. Brown, 4 J. Ch. Rep. 682-4, are cases on which the Chancellor relied to show that the bill was wanting in equity. These decisions are not controverted, but they are unlike the present case, both in their facts and the principles on which they rest.

To show that the case made by the bill was one in which Chancery should interfere, the plaintiffs counsel cited McDermot v. Strong, et al. 4 John. Ch. Rep. 687; Edmunston v. Lyde, 1 Paige's Rep. 637; Beck v. Burdit, Id. 305; Story's Eq. Plead. 102-3-4: 2 Barbour's Ch. Prac. 151-6, (note 1,) 154, 158, 162; Hendrick v. Robinson, 2 John. Ch. Rep. 283, 312-3; Clarkson v. De Peyster, et al. 3 Paige's Rep. 320; McElwain v. Willis, Id. 320; Van Cleek v. Sickles, 5 Id. 505; Com. B. of L. Erie v. Meach, 7 Id. 449; 2 Hoffman's Ch. Prac. 121; Livingston v. Ram, 3 John. Ch. Rep. 224; Wiggins v. Armstrong, 2 Johns. Ch. Rep. 144; Shirley v. Watts, 3 Atk. Rep. 200; Chamberlaine v. Temple, 2 Rand. Rep. 385; Hadden v. Spader, 20 John. Rep. 554; Wakeman v. Grover, et al. 4 John. Ch. Rep. 23; Moffat v. Ingham, et al. 7 Dana's Rep. 495; Newgate v. Lee, 9 Id. 17, 20; Wakeman v. Grover, 4 Paige's Rep. 637; Cassidy v. Meacham, 3 Id. 311; Leggett v. Hopkins & Smith, 7 Id. 149; Bean v. Smith, 2 Mason's Rep. 252; see, also, 7 Paige's Rep. 56; 1 Verm. Rep. 399; 3 Atk. Rep. 200; 4 J. B. Moore's Rep. 163; Doe ex dem. Davis v. McKinney, 5 Ala. Rep. 719; 1 Story's Eq 366, 370.

5. The bill has a single object in view, and although some of the defendants may have no connection with each other, but claim severally, under distinct conveyances, different portions of the property in question, yet the bill is not obnoxious to the objection of multifariousness. [Boyd, et al. v. Hoyt, et al. 5 Paige's Rep. 65; Clarkson v. De Peyster, 3 Id. 320; Fellows v. Fellows, 4 Cow. Rep. 682; Stafford v. Mott, 3 Paige's Rep. 100; Cuyler v. Moreland, 6 Id. 273-7; 2 Barbour's Ch. Prac. 156; Cummings & Cooper v. McCullough, 5 Ala. Rep. 324; Story's Eq. Plead. 233-4, 408 9 10-11-12; 2 Hoffm. Ch. Prac. 121; Child v. Brace, 4 Paige's Rep. 315; Gleason v. Gage, 7 Id. 123.]

6. The conveyances in question are fraudulent in point of fact, and some of them bear upon their face such marks of fraud, as should induce a Court of Equity at least to declare them void. [Gazzam v. Poyntz, 4 Ala. Rep. 374; Hyslop v. Clark, 14 John. Rep. 458; Sands v. Codwise, et al. 4 Johns. Rep. 536; Austin v. Bell, 20 John. Rep. 442; Naylor v. Fosdick, 4 Day's Rep. 146, 250-2-6; Ashurst v. Martin, 9 Porter Rep. 566; Mackie v. Carnes, 1 Hopk. Rep. 373; Bank U. S.

v. Lee, et al. 13 Peters' Rep. 101; Venable v. U. S. 2 Peters' Rep. 368; Williams & Battle v. Jones, 2 Ala. Rep. 313; Bozeman v. Draughan, 3 Stew. Rep. 243; Doan v. Eddy, 16 Wend. Rep 523; Randall v. Cook, 17 Id. 53; Stoddard, et al. v. Butler, 20 Id. 507; Sturdevant v. Ballard, 9 John. Rep. 337; Statson v. Brown, 7 Cow. Rep. 732; Clow v. Wood, 5 Sergt. & R. Rep. 275; Clayton v. Anthony, 6 Rand. Rep. 285; Hobbs v. Bibb, 2 Stew. Rep. 50; Moore v. Ayres, Id. 336; Moore & P. v. Tarlton & P. 3 Ala. Rep. 444; P. & M. Bank v. Borland, 5 Ala. Rep. 531; P. & M. Bank v. Willis & Co. Id. 770.]

7. There is a prayer for both general and special relief, and this entitles the complainant to all the relief which the proof makes out, if consonant to the bill. In the present case, the proof very satisfactorily establishes, that the several conveyances by George Walker, John H. Walker and Robert Lowe, were all conceived in fraud, and that the debt of the latter to Willis & Co. has been fully paid off, and the mortgage is kept open as a mere cover for the mortgagor's property. To show that relief was authorized by the frame of the bill and prayer, he cited 8 Wend. Rep. 339; 1 John. Ch. Rep. 117; 3 Paige's Rep. 320; 1 Story's Eq. Plead. §§ 40 1-2; 2 Mason's Rep. 299; 1 Paige's Rep. 637; 12 John. Rep. 494; 7 Paige's Rep. 163-6; 4 Johns. Rep. 554.

8. The decree should not only be reversed, but it should be here rendered, giving to the complainant the relief prayed. The bill, proof, &c. shows that the cause was in a condition for a final hearing; that it was submitted to the Chancellor for that purpose, and that his decree was definitive. If this Court shall reverse it, such a decree should be here rendered as the Chancellor should have made in the cause.

T. Williams, for the defendants, insisted that the case made by the bill was substantially this, viz: that the plaintiff had recovered judgments against George Walker, John H. Walker, and Robert Lowe; that these persons had property enough to pay the judgments, but they had fraudulently conveyed the same, with intention of defeating their collection. The bill was filed after the executions had been levied, and bond and security had been given to try the right to some of the property sought to be subjected in this suit. Now, although a judgment creditor has a right to go into equity, to have his judg-

ment satisfied, yet he must proceed against the equitable funds of the debtor, and to entitle him to do this, he must alledge and prove that he has exhausted his legal remedies, without being able to obtain satisfaction. [2 Stew. Rep. 378; 4 John. Ch. Rep. 676; 2 McC. Rep. 416.] This has not been done; so far from the legal remedy being unavailable, it appears that the plaintiff is litigating with some of the defendants to his bill, whom he supposes to be fraudulent grantees, the liability of the property levied on to satisfy his executions; and it cannot be admitted that a Court of law is incompetent to try the question of fraud, as fully and effectually as a Court of Chancery. Until the levy is discharged, and the last execution issued returned "no property found," the plaintiff *upon the facts alledged*, cannot be heard in equity.

It is a rule of law, that the levy of an execution is *prima facie* a satisfaction, until it is disposed of. If the plaintiff considered the levies likely to prove unavailing, as against the claimant of the property, he could have dismissed them, and on the proper return being made, have filed his bill.

It is not contended that a creditor may not come into equity against the fraudulent grantee of his debtor, until an execution against the latter was returned "no property found;" but in the present case it is not pretended that a discovery is necessary to aid the proceedings at law, and the aspect in which the case is presented, does not show the necessity for the interposition of Chancery.

He argued that the bill and the issues at law all went to question the validity of the sales, that the proceedings at law were for the same claim or demand, and that the election of a remedy at law, under the coercion of the Circuit Court, should be enforced.

Again; the bill is defective for multifariousness, if verbosity, repetition, &c. amount to such an objection, then it is only necessary to look into the bill, to find proof demonstrative, that it is defective in this respect. For its prolixity, it should perhaps have been referred to the register, that it might have been abridged; this was not done, but the demurrer raises the question of multifariousness; and it is insisted that the bill tenders four distinct issues: 1. As to the assignment of John H. Walker to Borland. 2. The assignment of George Walker to Steele.

3. The mortgage by Lowe to A. Willis & Co. 4. The mortgage by Lowe to Pylant. [See Story's Eq. Plead. 224-5-6-7-8.]

The proof in the case was taken *ex parte*, and should not be considered as proving any thing against the defendants, who had no notice when it would be taken, and consequently did not cross-examine the witnesses. This being the case, the Chancellor should only have looked at the bill, answers and exhibits, which were admitted by the parties, and these did not make out the plaintiff's case, but went directly to defeat it.

All fraud is denied by Borland and Steele. Willis & Co. claim under a mortgage, which is still operative and in full force, although it may have been assigned to a third person; and no decree can be rendered against the validity of that mortgage, until the assignee is brought before the Court.

It is not enough, as in this case, that the bill alledges that there are no creditors of the defendants, besides the plaintiff; these should have been brought before the Court, and a decree upon the bill, without making them parties, would be erroneous. [2 Ves. Rep. 312; 18 Id. 78, 82.]

If the transfers of property which are assailed were fraudulent in the beginning, still they may become valid by the payment of a sufficient consideration afterwards, [8 Wend. Rep. 1.] Borland and Steele, by the payment of the debts of their respective grantors, acquired a good title to the property conveyed to them, without regard to the question of previous fraud. A debtor may, and sometimes ought to prefer his creditors. The Walkers have done nothing more, (4 Johns. Rep. 583,) and the lien of their assignee is unquestionable. [See 4 Cranch's Rep. 137; 1 A. K. Marsh. Rep. 110; Id. 434; 2 Murp. Rep. 242; 1 Bibb's Rep. 244; Carr v. Callaghan, 3 Litt. Rep. 337; Dev. Eq. Rep. 18; Litt. Sel. Ca. 218; 2 Paige's Rep. 390; 2 Bibb's Rep. 12; Breese's Rep. 33; 1 Younge's Rep. 407; 4 Litt. Rep. 190; 5 Litt. Rep. 94; 5 Hayw Rep. 241; 5 Monr. Rep. 408; 4 J. J. Marsh. Rep. 169; 4 Rand. Rep. 272; 1 Dess. Rep. 114; 13 Wend. Rep. 240; 3 A. K. Marsh. Rep. 179; 1 Bibb's Rep. 277.] And the vendee will be entitled to a lien for advances upon a purchase set aside, although it be doubtful whether the sale was not fraudulent. [1 Vern. Rep. 465; 2 Id. 678; 2 P. Wms. Rep. 203; 2 Ves. Rep. 516; 1 John. Ch. Rep. 478.]

COLLIER, C. J.—It is laid down generally, where a plaintiff sues both at law and in equity for the same thing, the latter tribunal will compel him to elect in which Court he will proceed. But before an election will be ordered, it is said the defendant must have filed a sufficient answer, and the time for excepting elapsed. After the order is made, the plaintiff is not at liberty to proceed, either at law or in equity until he has elected; yet, if the order has been unadvisedly made, the plaintiff may move to discharge it. *Further*, it is said a plaintiff is sometimes allowed to elect specifically, that is, to proceed to a certain extent in one Court, without prejudice to his proceeding in the other Court. [1 Smith's Ch. Prac. 561-3, and cases there cited; 1 Hoffm. Ch. Prac. 342-4, and cases there cited.]

So where the plaintiff has obtained a judgment at law, and at the same time filed a bill in Chancery, on the coming in of the answer, he will be put to his election, either to proceed at law on the judgment, or in the suit in equity. [Rogers v. Vosburgh, 4 Johns. Ch. Rep. 84; Cockerell v. Cholmeley, 1 Russ. & M. Rep. 418; 3 Russ. Rep. 565; 6 Bligh. N. S. 120; Livingston v. Kane, 3 John. Ch. Rep. 22; Gibbs v. Perkinson, 4 H. & Munf. Rep 415]

The thirty-sixth rule, "for the regulation of the practice in Chancery," is as follows: "Where a suit at law and a bill in Chancery are instituted for the same claim or demand, the defendant, on suggestion, supported by affidavit, may move the Court to inspect the records, and if it appear that the two suits are for one and the same cause of action, it shall be ordered that the plaintiff elect in which he will proceed, and that he dismiss the other." Under this rule, the defendant, Borland, moved the Circuit Court to compel the complainant to dismiss the levy of the *pluries fi. fas.* in respect to sundry slaves embraced in the sale made by J. H. Walker to Borland, in 1840, which it is the object of the complainant's bill, among other things, to annul; or, if the defendant elected to proceed thereupon, then to dismiss his bill *pro tanto.* The complainant elected the alternative, and the Chancellor confirmed the order of election, under the impression that this Court had adjudged it to be proper. True, when the case of the Planters and Merchants' Bank of Mobile v. Borland, 5 Ala. Rep. 531, growing

out of the levy referred to, was here, the learned Judge who delivered the opinion of the Court, intimated in no equivocal terms, that the powers of a Court of law, were adequate to coerce an election by the plaintiff, where a suit for the same claim or demand, was pending there and in a Court of Equity at the same time. And the fair inference from what he said, is, that the order made by the tribunal first acting upon the subject is conclusive. Neither my brother ORMOND, nor myself, supposed, the opinion of our late respected associate went so far, as a more critical examination shows. We can only account for our misapprehension of it, when read in consultation, from the fact, that the propriety of the election was not regarded by the Court, as a material point in the cause, and whatever might have been our conclusion thereupon, would not have influenced our judgment, as will hereafter appear.

In the Planters and Merchants' Bank of Mobile v. Willis & Co., 5 Ala. Rep. 770, the same question was raised, and we then said that the regularity of the order of election was not then presented for revision. *Further*, "That order is inconclusive of the cause in Chancery, until that Court shall act upon it, and give effect to the forced election of the plaintiff. This being the case, it is not the subject of a revision by an appeal or writ of error; besides, if it were, the writ of error which has been sued out, does not complain of it, but seeks only the reversal of the judgment, on the trial of the right of property. The direction in regard to the suit in equity, could not, in the slightest degree, have affected the result of the case before us; whether right or wrong, was wholly immaterial to its decision. The reversal of the judgment, will not annul the order of election; that will still continue operative, as far as the *Court of law could make it so.*

"But the plaintiff cannot be irreparably prejudiced by the order of the Circuit Court; if erroneous, (as we incline to think it is,) it may be vacated by *mandamus*, addressed to that tribunal, or the Court of Chancery. And the latter may be required to proceed as if no election had ever been made; and this, although a decree dismissing the bill may have been rendered, under the influence of the plaintiff's election."

These remarks apply with all force to the case against Borland, and show what was there said as to the power of the Cir-

cuit Court to order an election, and the conclusiveness of such an order is a mere *obiter dictum*, and is "not a resolution or determination of the Court, or a direct solemn opinion of the judge from whom it dropped; no formed, decisive resolution, no adjudication, no professed or deliberate determination." [Ram on Legal Judgment, 37.] "An opinion given in Court, says Chief Justice Vaughan, "if not necessary to the judgment given of record, but that it might have been as well given, if no such, or a contrary opinion had been broached, is no judicial opinion, no more than a *gratis dictum*." [Ibid.]

We are satisfied with what was said in the Planters and Merchants' Bank v. Willis & Co., and from the view taken of the effect of the *dictum* in Borland's case, it results that the Chancellor was left free to exercise his judgment upon the motion to order an election. Whether the order which he made was such as the identity of the cases and their nature required, will perhaps be shown by what has been, and will be said in this opinion. It is unnecessary to be more particular upon this point, because it is clearly inferrable from the case of Willis & Co., that the propriety of the order cannot be revised upon a writ of error, which complains of the dismissal of the complainant's bill, as to all the defendants. The remedy by which the order of election as to Borland may be annulled, (if necessary,) we have seen, is a *mandamus* acting directly upon it.

In Doe ex dem. Duval's heirs v. McLoskey, 1 Ala. Rep. N. S. 708, the motion to compel an election and consequent proceeding in the Circuit Court, took place, when that tribunal exercised jurisdiction, both at law and in equity; the papers in both causes were before the Court at the same time, and an order on either side of the Court might be made effectual, (so far as appropriate,) in a cause pending on the other. What was said in that cause, cannot consequently be regarded as conclusive, upon a case arising since the severance of the jurisdiction, and the assignment of law and equity to distinct judges.

2. The object of the complainant's bill, among other things, is, to set aside the sales made by George and J. H. Walker, of their property to Steele and Borland, and the mortgages executed by Lowe to Willis & Co. and Pylant, upon the allegations that the former were fraudulent in their inception, as

against creditors, and that the latter were either fraudulent when executed, or were held up with the view of delaying or defeating the creditors of the mortgagor. These allegations, unless affected by something stated in the bill, were sufficient to give to the Court jurisdiction at the suit of a creditor of a fraudulent grantor. Fraud, it is said, is a fruitful source of equity jurisdiction. Sometimes the wrong which it does, can only be repaired, and justice administered through a Court of Chancery; while in other cases it exercises a jurisdiction concurrently with law. [1 Story's Eq. chap. 6 and 7, particularly pp. 417-8-9-20-1-2; 4 Call's Rep. 253; 2 Har. & John. Rep. 487; Litt. Sel. Ca. 164; 4 Monr. Rep. 103; 4 Rand. Rep. 282; 4 Mason's Rep. 349; 1 John. Ch. Rep. 478.] When Courts of equity and law have concurrent jurisdiction of the matter in dispute, the Court which takes jurisdiction settles the matter conclusively. [2 Munf. Rep. 34; 3 Yerger's Rep. 167.] So, although property conveyed by a deed fraudulent and void, is liable under execution against the fraudulent debtor, yet equity will grant relief, by clearing away the impediment. [4 Bibb's Rep. 166.]

The levy of the execution on a part of the property embraced by the sales and mortgages in question, did not take from the complainant the right to go into equity, in order to vacate these several conveyances *in toto*. The only effect of the levies on the remedy in Chancery, would be, upon the interposition of a claim of property, to compel the plaintiff to elect, (if the matters in controversy were identical,) whether the suit should be prosecuted at law or in equity. But if this question were otherwise doubtful, it is settled by the sixth section of the act of 1828, "the better to provide for the trial of the right of property, and for other purposes." [Clay's Dig. 214.] That section is as follows: "Proceedings for the trial of the right of property, shall in no case prevent the plaintiff from going on to make his money out of other property than that levied on and claimed, if to be found; but the *supersedeas*, by appeal or writ of error, shall only apply to the property so levied on and claimed." The remedy to be pursued, to reach other property of the debtor is not pointed out; the act merely secures the right of the creditor, and he may adopt such remedy as the

law recognizes as appropriate, whether it be in equity or at law.

Conceding, that to entitle a judgment creditor to come into equity, to subject the equitable estate of his debtor, he should have "pursued his legal remedies to every available extent," without being able to obtain satisfaction, and still we think the equity of the bill may be supported. The bill is not framed upon the hypothesis, that the defendants in the judgment have an equitable interest in the property they have respectively transferred; but upon the assumption that the several transactions impugned, were intended "to delay, hinder and defraud creditors." If this be the true intent and purpose of the judgment debtors, they have no interest which they could assert in equity; for being *in pari delicto* with those who claim as their assignees, Chancery would not entertain a bill in their favor, but leave them to adjust as they could, the rights they set up, without lending its aid. But the right of the creditor to subject property of his debtor fraudulently conveyed, is founded in that principle of the common law, which enjoins integrity as a virtue paramount to generosity, and denounces fraud as incompatible with honesty and fair dealing. This principle is re-affirmed by our statute of frauds, which declares, that every gift, grant, or conveyance, of lands, &c. goods and chattels, &c.; and every bond, suit, &c. had or made, and contrived of malice, fraud, covin, collusion or guile, to the intent or purpose to delay, hinder, or defraud creditors, &c. shall be clearly and utterly void, &c.

If a gift, grant, or conveyance, be void as it respects creditors, it is at least competent to levy on and sell the personalty under execution, however the law may be as it regards land. But, although we have seen the creditor has this legal right, yet he is not obliged to exercise it where the debtor has embarrassed his title by making a fraudulent conveyance. Under such circumstances, he may go into equity, and ask that the conveyance may be set aside. And in such case, if the plaintiff makes out the fraud, the decree will not stop merely by annulling the deed, but it will order the sale of the property, and provide for the payment of his debt. [Garland v. Rives, 4 Rand. Rep. 282.]

The right to disembarrass the title before the property is sold to satisfy the judgment, is valuable to the creditor; if he

were compelled to sell it under execution, incumbered with a conveyance, or lien, supposed to be fraudulent, comparatively few would be inclined to purchase, and they at a depreciated price. This consideration, apart from all others, is a potent argument in favor of the jurisdiction of equity.

3. Many witnesses were examined, at the instance of the complainant, with the view of showing that the several sales and mortgages in question were fraudulent; their testimony, so far as material, may be thus condensed, viz: In September, 1840, both George and J. H. Walker were much in debt, and believed to be insolvent. In that month they both sold their entire real and personal estate; the former to his brother-in-law, David A. Steele, for a price agreed, which was to be paid in ten annual instalments. The employment of the slaves and the use of the land, &c. sold by George Walker, would pay the stipulated price, one of the witnesses says, in six years, another in seven, and others in from six to eight years. George W. has received the proceeds of wood sold from the land convey ed, though he may have accounted to Steele therefor. About the same time, J. H. Walker sold all his property to A. Borland, his father-in-law, for a price which Borland represented differently at different times; but taking the largest sum as indicating the price, it was thought that the property could be so employed as to pay for itself in from six to ten years. Borland's contract obliged him to pay some debts owing by his vendor, and the remainder of the purchase money at different periods in the future; the last of which payments had twelve years to run. Borland said his object in making the purchase was to save the property, and he thought he could make it pay for itself on the credit obtained.

In 1841, J. H. W. acted professedly as Borland's overseer. After Steele's purchase, he employed overseers on the plantation conveyed to him by G. W. Since the respective purchases, Borland and Steele have shipped the cotton crops in their names. The witnesses know of no change of property from either of the vendors—they each live where they did in 1840, have their carriages, house servants, &c. G. W. has since exercised an apparent control over the wagons employed in hauling wood from the land he sold to Steele, (to the river for sale,) as also over blacksmiths, and a shop which were embraced in his sale

to him. The Walkers, Borland and Steele, live in the neighborhood of each other, where they did in September, 1840.

In Borland v. Walker, et al. at this term, upon proof by no means more unfavorable to the plaintiff, in that case, than the evidence above recited, it was determined that the contract between J. H. Walker and Borland, was intended "to delay, hinder, or defraud" the creditors of the former, and was consequently void. Without recapitulating the reasoning there employed by the Court, we will content ourselves by referring to the opinion, and adopt it as an authority for the same conclusion in the present case.

Every argument employed to show the invalidity of Borland's purchase, applies with all force to the sale by G. Walker to Steele. There too, the contracting parties were nearly connected by affinity, lived, and still continue to live, in the same vicinity; the vendor was greatly indebted, by some persons imputed insolvent; after the sale, there was no visible, notorious change of possession: but whatever control the vendee exercised, in employing overseers, and selling the cotton crops, &c., if acts of unequivocal significance as between the parties themselves, were not such *indicia* of a renunciation of possession as would charge the creditors of the vendor with notice. *Again*, the vendor continued, long after the commencement of this suit, and perhaps still does, to occupy the house in which he resided on a part of the land conveyed; himself and family are attended by the same servants, ride in the same carriage, and use the same furniture. *Further*, he appears to direct the wagons employed in hauling wood from his land to the river, to receive money for the wood, and to use the accounts due the blacksmith's shop in paying his own debts. *To all this it may be added*, that property is sold at a price payable in ten annnal instalments, which may be paid in six or eight years by the profits derivable from its employment and use; thus placing it in the power of the vendee to stipulate with the creditors of the vendor, to receive their demands on terms less favorable than by law they were entitled, rather than encounter the risk of an entire loss, or a delay, which might in many cases operate great inconvenience. This is a mere condensation of the argument, suggested by the facts. We need not amplify it; this was done

in Borland v. Walker, et al, and resting upon that case, we are constrained to conclude that the conveyance by G. Walker to Steele, tends "to delay, hinder, or defraud" the vendor's creditors, and must be set aside.

4. The mortgage from Lowe to Willis & Co., was before this Court in the Planters and Merchants' Bank of Mobile v. Willis & Co., cited above. There is nothing upon its face that indicates its invalidity, and the proof does not show that it was fraudulent *ab initio.* If the debt intended to be secured, has been paid so as to extinguish the security, then the property embraced by the mortgage is discharged from it, and if there are no liens superior to the plaintiff's the property should be subjected to the satisfaction of the judgment, sought to be collected. We express ourselves thus cautiously upon this point, because the plaintiff's counsel has furnished a brief of what he calls an answer of one of the firm of Willis & Co., in which that defendant admits the payment of the debt due the firm, but perhaps shows that it was not paid by the mortgagee, but by a third person, to whom the debt and mortgage were assigned. Now this answer is not found in the record before us, but it most probably remains in the file in the Court of Chancery. Be this as it may, we think it unnecessary to add more upon the point, than refer to the case last cited, in which we considered the rights of the creditor in connection with facts similar to those supposed to be stated in the answer.

In respect to the mortgage from Lowe to Pylant, though impugned by the bill, its validity has ceased to be a matter in controversy by the death of the mortgagee, and abatement of the suit as to him.

5. We have repeatedly had occasion to remark upon the doctrine of multifariousness, as applicable to bills in Chancery, and have heretofore shown the utter impracticability of laying down any general rules, by which with unerring certainty, it may, in all cases, be determined, whether the objection is well taken. [Kennedy's heirs & Exr's. v. Kennedy's heirs, 2 Ala. Rep. 608; Lewen v. Stone, et al. 3 Id. 490.] Mr. Justice Story says, "The conclusion to which a close survey of all the authorities will conduct us, seems to be, that there is not any positive inflexible rule, as to what, in the sense of

Courts of equity, constitutes multifariousness, which is fatal to the suit on demurrer. These Courts have always exercised a sound discretion in determining, whether the subject matters of the suit are properly joined, or not; and whether the parties, plaintiffs or defendants, are also properly joined or not." [Story's Eq. Plead. 413.]

It is said, that a demurrer for multifariousness will not be sustained, where the parties (either plaintiffs or defendants) have one common interest touching the matter of the bill, although they claim under distinct titles, and have independent interests. [Story's Eq. Plead. 120–1, 233.] Hence, it has been held, that several judgment creditors may join in one bill against their common debtor and his grantees, to remove impediments to their remedy created by the fraud of their debtor, in conveying his property to several grantees, although they take by separate conveyances, and no joint fraud in any transaction is charged against them all. In such a case, it is said, the fraud equally affects all the plaintiffs, and all the defendants are implicated in it in different degrees and proportions, and therefore are liable to be jointly sued. [Ib. 233, & notes, 409.]

Again; it is said, that although the defendants may not have a coextensive common interest, but their interest may be derived under different instruments, if the general object of the bill will be promoted by their being united in a single suit, the Court will not hesitate to sustain the bill against all of them. [Story's Eq. Plead. 410, and cases cited in the notes.] By a common right, or interest, we are not to understand one which is necessarily joint, it may be a right or interest which is common to, or concerns all the defendants, though perhaps in unequal degrees. [Id. 413, note 1.]

In the present case, joint judgments were recovered by the complainant against G. Walker, J. H. Walker, and Robert Lowe, all whom, it is alledged, have united in a fraudulent purpose to defeat the collection of these judgments: and to effect that end, have each made transfers of all their property. The two former, by absolute sales, professing to pass the possession and property to their respective vendees; the latter, by mortgages. All these transactions are charged to have been fraudulent, not only on the part of the defendants in the judg-

ment, but of their vendees and mortgagees. Here, then, it is apparent, that the three defendants last named, have a common interest in the leading object of the bill, viz: the satisfaction of the judgments, and they are charged with a joint participation in the design to defraud, which led to the supposed fraudulent transfers. This being the case, we think the authorities cited, clearly warranted the plaintiff in joining them in one suit; especially, as by thus uniting them, their rights could not be prejudiced, by subjecting them to increased costs, or protracting litigation. If several bills were filed against each of the defendants in the judgment, each of those bills would, in all probability, be almost as voluminous as one bill embracing all; and about the same number of depositions would be taken in each, as in a single suit.

As then a demurrer for multifariousness would not be sustained, for the reason merely, that the bill attacked the transfers of property made to the three defendants in the judgments, on the ground of fraud, we think the objection cannot be successfully interposed by those who claim under them, derivatively. The citations already made, sustain us in this conclusion.

6. A motion for the continuance of a cause, addresses itself to the discretion of the Court in which it is made; and however unwisely that discretion may be exercised, it cannot be revised by an appellate Court.

7. The motion to suppress the depositions, was properly overruled. When the commission issued under which they were taken, but one of the defendants had answered, and his counsel was duly notified of the time and place where the commission would be executed. The other defendants were in default, and a decree *pro confesso* had been rendered against them; this being their predicament, they cannot insist on a want of notice; but it was competent for the plaintiff to make out his case by testimony taken *ex parte*. [Clay's Dig. 351, § 39; Wilkins & Hall v. Wilkins, 4 Porter's Rep. 249.]

The defendants having afterwards answered, and the decree *pro confesso* thereupon set aside, did not authorize the rejection of the depositions or render them incompetent. If such an effect were given to the answers, then the neglect, or

caprice of the defendants might occasion expense or inconvenience to the complainant, and perhaps injury; especially, if the witnesses, or some of them, were to die or remove from the country, so that their testimony could not be taken again. The correct practice in such case, would be upon the decree *pro confesso* being set aside, for the defendants who filed answers to move upon a proper showing for leave to take the depositions of the same witnessess at the defendant's instance, and a commission could issue on such terms as would amply protect the complainant.

It is unnecessary to consider other points, suggested by the argument, or presented upon the record. The view already taken, we think, will lead to an adjustment of the matters in controversy. We have only to add, that the decree is reversed, and as we cannot know what disposition has been made of the cases of the trial of the right of property which were pending at law, we think it safer for that, if for no other reason, not to render a final decree here. The cause is therefore remanded.

SPRAGUE AND WIFE v. MORGAN AND WIFE.

1. When the plaintiff declares on the common counts against husband and wife, for work and labor at the instance of the wife, a recovery is proper, though the evidence discloses a contract with the wife when sole, and the performance of the service after the intermarriage.
2. A recovery may be had on the common counts although there is a special contract, whenever by its breach the plaintiff is entitled to recover a sum *in numero*, or which can be rendered certain by a mere calculation.
3. Where there is a contract to pay a gross sum for tuition of pupils, and they are taken from the school before the expiration of the term, without any fault of the teacher, or the occurrence of some act rescinding the contract, he is entitled to recover the whole sum stipulated.

Writ of error to the Circuit Court of Dallas.

ASSUMPSIT by Morgan and wife against Sprague and wife, on the common counts.

At the trial, on the general issue, the plaintiffs proved certain services, as a teacher, rendered by the wife of the plaintiff whilst sole, to the defendants after their intermarriage, the contract for which was made by the wife of the defendant whilst sole. There was also evidence tending to show, that those services were rendered on a special contract, which was entire, providing that the pupils to be taught should go a full session, and a gross sum to be paid therefor, and that this contract had been broken by the defendants, in taking away the pupils before the end of the session, and the plaintiffs insisted the defendants were liable, by such breach, to pay the entire sum agreed to be paid. There was no evidence to support the count upon an account stated.

On this proof the defendants asked the Court to charge the jury, that if they believed the services were rendered after the intermarriage, although under a contract made previously with the wife of Sprague, the plaintiffs could not recover in this form of action.

Also, that if there was a special contract, as spoken of by the evidence, then the plaintiff could not recover in this form of action, or could only recover for the services actually rendered.

These charges were refused, and the refusal is now assigned as error.

EDWARDS, for the plaintiff in error.

No counsel appeared for the defendants.

GOLDTHWAITE, J.—1. The question is not, whether the husband defendant could have been sued below, as upon the ratification of the contract of his wife, in consequence of the acceptance of the services, but is, whether both are liable to this form of action, by reason of the wife's contract. We think they were so liable; for, although the services were to be rendered after the contract, the wife was bound by it; and although the breach was after the marriage, it was the breach of her contract, in precisely the same manner as if when sole

she had given a note, which, falling due after the marriage, the husband had refused to pay.

2. As to the other questions, there is nothing in them. A recovery may be had on the common counts, although there is a special contract, whenever, by the breach of it, the plaintiff is entitled to recover a sum *in numero*, or which can be rendered certain by mere calculation. In other words, when the damages arising out of the contract are not unliquidated.

3. If, as stated, the contract was to pay a gross sum for the teaching of the pupils for the entire session, and they, after the commencement of the session, were taken away, without any fault of the plaintiffs, or the occurrence of some act which entitled the plaintiffs to consider the contract as rescinded, there is no doubt of the right to recover the whole sum stipulated to be paid. Such, in effect, was the charge of the Court, and we see no error in it.

The judgment of the Circuit Court is therefore affirmed.

COLLIER, C. J.—Upon the first point considered by my brother GOLDTHWAITE, I was somewhat inclined to doubt, but further reflection has led to a concurrence in the conclusion he attained. It is said that where the plaintiff had been prevented from a performance of a verbal contract, by the defendant, a recovery may be had on the common counts in assumpsit. [1 Chitty's Plead. 298; 1 East's Rep. 58; 11 Id. 285; 1 Taunt Rep. 12; 5 B. & C. Rep. 638.]

When a *feme sole* who has entered into a contract marries, the action must, in general, be brought jointly against the husband and wife, though they state an account, and expressly promise to pay the debt, or perform the contract. [7 T. Rep. 348.] And it has been held, that the husband cannot be sued alone upon an express subsequent promise by himself, unless there be some new consideration for the same, accruing to him, or causing an inconvenience or delay to the creditor. [3 P. Wms. Rep. 409.] If a promise by the husband to pay money upon an *ante-nuptial* contract of the wife, will not change the duty from a joint to a several liability, a performance by the other party, after marriage, cannot have that effect. This being the law, it necessarily follows that the defendants were both answerable to the plaintiff, upon the contract made by the

wife; that the transfer of her liability to the husband, by the legal effect of the marriage, and acceptance, or refusal to accept the plaintiff's services, are equivalent to a positive request by the husband, and make him liable as if the contract had been originally made by him. It results from this view, that the common counts warranted the admission of the evidence, and that the form of declaring was adapted to the cause of action.

LAKE v. GILCHRIST.

1. When a note made upon a gaming consideration, is transferred in payment of a debt, an action may be maintained upon the consideration of the original debt, without proof of any diligence to recover the amount of the note from the maker.
2. When the note of an insolvent man is passed off in payment of a debt, and the insolvency is artfully concealed, by any stratagem, or unfair practice, an action may be maintained upon the original consideration.
3. Although a witness in answering an interrogatory, under the law authorizing parties to be examined, may state any thing which relates to the immediate subject, upon which he is called on to answer, and his response must be taken entire, or not at all, yet his answer to a distinct matter from that inquired of, is not evidence for him.

Error to the Circuit Court of Lowndes.

Assumpsit by the plaintiff in error, against the defendant in error, as surviving partner of Gilchrist and Bedford.

The three first counts of the declaration are for the purchase money on the sale of land, by the plaintiff to the defendant.

The substance of the fourth count is, that upon accounting with the plaintiff, the defendant and his former partner fell in debt to him $280, and to induce him to receive in payment therefor, a note for that amount, made by one Robert L. Campbell, to one B. F. Dozier, and by him indorsed to the defend-

ant and Bedford, undertook, and faithfully promised, and assumed, to him, that the note was legally due by the said Campbell, to them as indorsers, and that a judgment could be recovered on the same, against Campbell; and further alledges, that they deceived and defrauded him, in this, that the note was not legally due, from Campbell, but the same was given by Campbell, to Dozier, for a gaming consideration, and all which was well known, &c., by means whereof, &c.

The fifth count is the same as the last, except that it was alledged, that the defendant guarantied, that the said Campbell, was legally liable to pay said debt, when in truth he was not; the same being given upon a gaming consideration.

The sixth count charges, that when the plaintiff received the note of Campbell in payment of the debt, he believed him to be solvent, and able to pay; that the defendant knew he was insolvent, and unable to pay, and artfully concealed the fact from the plaintiff, by means whereof, &c.

The defendant took issue on the three first counts, and demurred to the three last, and his demurrer was sustained by the Court.

Upon the trial, the plaintiff proposed to read the portion of an answer, to an interrogatory, which had been put to the defendant under the statute, so far as it was responsive to the interrogatory, and to suppress the residue, which the Court refused, and ruled the entire answer to be evidence. The interrogatory and answer are as follows:

"Is not the sum of two hundred and eighty dollars, with interest from the time of the transfer of said note, the balance on said land, due at the transfer thereof, still unpaid in any other way, than by the transfer of said note to said Lake?"

"He answers, that from information, he believes, that Bedford passed said note of Campbell to Lake in part payment of the purchase of said land, with the distinct understanding, and agreement between them, that Lake should use a degree of diligence, which he has failed to observe, to collect said note, otherwise Gilchrist and Bedford were not to be bound for the payment of the same. Defendant then answers, that to the amount of said note, said land was never he believes paid for, in any other way, than by said note." To which the plaintiff excepted.

The plaintiff then produced the note of Campbell, and gave evidence, that a constable had two small executions against Campbell, in 1841, and could not make the money, and proved a tender of the note to defendant before suit brought.

The plaintiff moved the Court to charge, that if the note was given in payment of an existing debt, and that the money had not, and could not have been collected from Campbell, that it was no payment of the demand.

Which the Court refused to give, and charged, that when plaintiff accepted the note of Campbell on account of the indebtedness of defendant, he was bound to demand the money of Campbell, and give notice of non-payment to defendant, in a reasonable time, and if such was not done, or excused, defendant was not responsible in this action.

The assignments of error are, the judgment on the demurrer, and the charge given, and refused.

T. Williams, for plaintiff in error.

Cook, contra, cited 2 Madd. Chan. 440; 13 Vesey, 47; 1 Porter, 260; 2 Id. 308; 7 Id. 175.

ORMOND, J.—In Bates v. Ryland, 6 Ala. Rep. 668, we had occasion to consider the effect of a contract, by which a note is received in payment of a pre-existing debt. In that case, after an elaborate examination of the authorities, it was held, that the creditor might declare for the precedent debt, or consideration, but could not recover, without showing the same degree of diligence, as would be necessary to recover from the defendant, on his indorsement.

It was also held, that when the maker of the indorsed note was insolvent, and died before the creditor was by law required to sue him, the indorser was directly liable. In this case, it does not appear that the note of Campbell, received in payment of the debt, was indorsed to the plaintiff, but that does not vary the case, because, unless a sufficient excuse was shown, the diligence required in either case, would be ascertained by the character of the instrument transferred. If it was mercantile paper, by demand and notice. [Milton v. De Yampert, 3 Ala. Rep. 648.] If not governed by the commercial law, then by bringing suit to the first Court, to which it

could be brought against the maker. [Jordan v. Garnett, 3 Ala. Rep. 610]

As no suit was brought in this case, or any diligence employed to collect the money of the maker, it becomes necessary to inquire, what will be a sufficient excuse for the want of diligence. In the case of Bates v. Ryland, cited from 6 Ala. Rep., it was held, that the death, and insolvency of the maker of the note, before the holder was obliged to commence suit, was a sufficient excuse. So in Trotter v. Crockett, 2 Porter, at page 411, the Court held, that where a fraud had been practiced, as when the maker of a note given in payment of an existing debt, was represented to be solvent, when he was insolvent, or when the note was a forgery, it would be a sufficient excuse for the want of diligence.

The result of these decisions, may be thus summed up—when a note or other instrument, is received in payment of an existing debt, the creditor must use due diligence to recover it, from the maker, or he cannot sue the debtor upon the original consideration. If the instrument so transferred is governed by the commercial law, by a demand and notice of non-payment. If not mercantile in its character, by a suit thereon to the first Court to which suit can be brought, as required by the statute, unless a fraud has been practiced on the creditor in the transfer, as by a false representation of the solvency of the maker, or unless the instrument so transferred, has no legal validity; as for example, if it be forged; for there is in every such transfer, an implied warranty, that the instrument is legally valid, and that a judgment may be recovered thereon against the maker.

With this exposition of the law, we proceed to the consideration of the declaration. The fourth count charges as an excuse for want of diligence in collecting the money, that the note was not legally due, being given for a gaming consideration. This comes within the rule above laid down. The note was not a valid security, being declared void by statute, there was therefore, no necessity for bringing a suit upon it, and upon offering to return the note, the plaintiff could recover upon the original consideration.

The fifth count is the same as the preceding, with the additional averment, that the defendants guarantied, that the ma-

ker of the note was legally liable to pay it, which is what the law would imply, if no express warranty had been alledged. It is therefore substantially the same as the preceding.

The sixth count alledges, that the defendant knew that Campbell, the maker of the note, was insolvent, and unable to pay, and "artfully, and fraudulently, concealed the fact from the plaintiff," &c. We are not prepared to say, that the mere silence of the defendants at the time of the transfer, of the insolvency of Campbell, if known by them, would be a fraud. By the term, "artful concealment," we understand, that some unfair practice was resorted to, by which the plaintiff was intentionally deceived. So considering it, we think the count good, and the Court therefore erred in sustaining the demurrers to these counts.

The Court also erred in its charge to the jury, that the plaintiff could not recover, unless he proved a demand of Campbell, and notice of non payment in a reasonable time to the defendants. If the note was given upon a gaming consideration, the plaintiff was entitled to recover the original consideration, upon offering to return the note.

The remaining question, is the decision of the Court requiring the answer of the defendants to be read, although not responsive to the interrogatory. The intention of the Legislature in the passage of the act under which these interrogatories were filed, was, that they should be a substitute for a bill of discovery. The answers are to be "evidence at the trial of the cause, in the same manner, and to the same purpose and extent, and upon the same condition in all respects, as if they had been procured upon a bill in Chancery for discovery, but no further, or otherwise." [Clay's Dig. 341, § 160.]

The portion of the answer objected to, was not evidence against the plaintiffs. The question propounded, called on the defendant to state, whether the debt had been paid in any other way, than by the transfer of Campbell's note. In answer to which, the defendant goes on to speak of the contract, by which Campbell's note was received. This was a totally distinct matter from that inquired of; and although the witness may be allowed to speak of any thing which relates to the immediate subject, upon which he is called on to answer, and his answer must be taken entire, or not at all; the rule

does not apply when, as in this case, wholly irrelevant matter is introduced. If the defendant had thought proper, he might have interrogated the plaintiff, as to the nature of the contract, by which the note was transferred, but he cannot under the pretence of answering a different question, give evidence of the contract. This is the effect of the case of Lady Ormond v. Hutchison, 13 Vesey, 53, referred to by the plaintiff's counsel.

Let the judgment be reversed, and the cause remanded.

INDEX.

ABATEMENT.

1. When the person for whose use a suit is instituted dies pending the suit, it is not necessary that his personal representatives should be made parties, but the suit proceeds in the name of the nominal plaintiff. *Gray v. Turner, use of Johnson*, 30.
2. In an action upon a promissory note, which has been tranferred by delivery, if the nominal plaintiff die, the suit progresses in the name of the real plaintiff, who is liable for costs; and a distributee of the estate of the deceased is a competent witness for the plaintiff. *Bates v. Terrell*, 129.
3. A pending attachment may be pleaded in abatement by the garnishee, when sued for the same debt, by the original creditor. *Crawford v. Clute & Mead*, 157.
4. Where the plaintiff in an action of trespass to try titles dies *pendente lite*, the suit does not abate; but if brought for the recovery of the freehold, its prosecution may be continued in the name of the plaintiff's heirs, and if a term of years, or mere chattel interest is sought to be recovered, in the name of his personal representatives. As the pleadings do not show the *quantum* of interest in controversy, the heirs or personal representatives, as they may agree between themselves, may be made plaintiffs, their right to recover depending upon the proof as adapted to their respective interests. *The State, ex rel. Nabor's heirs*, 459.
5. An attachment sued out, and levied, returnable into the Circuit Court, is the commencement of a suit, and may be pleaded in abatement, to another suit, upon the same debt, though after the levy the papers are destroyed by the directions of the plaintiff, upon the supposition, that it was informally, or irregularly sued out. *Dean v. Massey*, 601.

See Attachment, 7.
See Pleadings, 12.
See Process, service of, 2.
See Variance, 3.

ACCOUNTS.

1. The statute of limitations will not run, so as to take from a plaintiff the benefit of a *payment* made to the defendant; there being mutual accounts between them. The statute applies only to causes of action, and then only after the right to sue has accrued. *Lucas v. Thorington's Adm'r*, 605.

ACTION.

1. A father may sue in case for an injury done to an infant child (then living with and engaged in his service) by dogs, permitted by the defendants to run at large, after a knowledge that such dogs were accustomed to bite mankind. *Durden v. Barnett & Harris*, 169.
2. An action on the case and not assumpsit is the proper remedy where the purchaser has accepted a deed for lands, and he has been defrauded by the omission to inform him of an outstanding incumbrance created by the vendor. *Morgan v. Patrick & Smith*, 185.
3. It is no valid objection to a suit that it is brought for the benefit of the principal in the note, which is sued as against a surety only, and two other persons as executors of an estate. *Hampton v. Shehan*, 295.
4. As a general rule, it is not allowable to join in the same action an administrator with one chargeable on his own account, but this rule has never been applied, so as to prevent the rendition of a judgment under the statute, against an appellant and his surety, though the former was an executor or administrator. *Bancroft, Adm'r, &c. et al. v. Stanton, Jr.* 351.
5. When the note of an insolvent man is passed off in payment of a debt, and the insolvency is artfully concealed, by any stratagem, or unfair practice, an action may be maintained upon the original consideration. *Lake v. Gilchrist*, 955.

See Executors and Administrators, 2.

See Indorser and Indorsee, 3.

ADMIRALTY PROCEEDINGS.

1. Objections to the sufficiency of a libel in an admiralty suit should be made in the Court below, and are too late when taken in the appellate Court. *Monroe & Tardy* v. *Brady*, 59.

AMENDMENT.

1. The omission to render a judgment of condemnation against a steamboat, when an appeal is taken by one on behalf of the owners, is not an error of which the parties to the appeal bond will be permitted to complain, as they cannot be prejudiced by it. The omission in such a case is clerical, and might be corrected on motion, if necessary. *Monroe & Tardy* v. *Brady*, 59.
2. Where a slave sold by a constable is afterwards levied on by another creditor, and claimed by the purchaser, an amended return made by the constable during the trial of the claim, may be read as evidence, it being good so far as it goes. *Savage* v. *Forward*, 463.
3. The statute authorizing the amendment of writs of error, authorizes an amendment of the writ, whenever the record furnishes the means of doing it. *Branch Bank of Mobile* v. *The Adm'rs of Murphy*, 577.
4. In the statutory action of detinue when the plaintiff consents to a nonsuit, if a judgment for costs is entered against his surety, as well as himself, it will be considered as a clerical misprision, and may be corrected at a subsequent term on motion of the defendants: but if such a judgment was ordered on due consideration, although it is irregular for one judge to correct the errors of another, the plaintiff could not be heard to assign error, as no injury has resulted to him from the amendment. *Harvey* v. *Jeter, et al.* 688.
5. *Semble*—That although it may not be permissible in a proceeding against a sheriff and his sureties, to contradict the return made by the former on process,

AMENDMENT—(CONTINUED.)

yet the Courts have an extensive control over their officers, and may permit amendments in their ministerial acts, so as to subserve right and justice. *Bondurant, et al.* v. *State Bank*, 831.

See Attachment, 9.

See Error, Writ of, 17.

See Judgment and Decree, 3.

APPEALS AND CERTIORARI.

1. When there are several suits, by material men, laborers &c., against a steamboat, commenced before a justice of the peace, and removed into the Circuit Court by appeal, it is not an error which can be revised here, for that Court to refuse to consolidate the causes; although the consolidation would have been properly ordered by the Circuit Court. *Monroe & Tardy v. Brady*, 59.
2. The omission to render a judgment of condemnation against a steamboat, when an appeal is taken by one, on behalf of the owners, is not an error of which the parties to the appeal bond will be permitted to complain, as they cannot be prejudiced by it. The omission in such a case is clerical, and might be corrected on motion, if necessary. *Ib.*
3. Where in a cause removed by appeal from a justice of the peace, the judgment of the County Court recited, that the parties came by their attorneys, and thereupon came a jury, &c., who returned a verdict for the plaintiff, the absence of the statement of the cause of action, a plea and issue, furnish no ground for the reversal of the judgment. *Bancroft, Adm'r. &c. et al. v. Stanton, Jr.* 351.
4. If an appeal bond recites the time when a judgment was rendered, its amount, &c., that the defendant had prayed an appeal to the "*next County Court*," is itself dated, and in other respects conformable to the statute, it will be sufficient, though the time when the Court sits is not stated. *Ib.*
5. As a general rule, it is not allowable to join in the same action an administrator with one chargeable on his own account, but this rule has never been applied, so as to prevent the rendition of a judgment under the statute, against an appellant and his surety, though the former was an executor or administrator. *Ib.*
6. Where a bankrupt is sued before a justice of the peace, and omits there to plead his discharge, he may, notwithstanding, insist upon it as a defence, when the case is appealed by him to the Circuit Court. *McCary, et al. v. Mabe*, 356.
7. An appeal bond, conditioned that the appellants shall prosecute their appeal with effect, and if they "fail therein, then pay the judgment with such damages and costs as shall be adjudged against them in said Court," substantially conforms to the statute. *Lightfoot, et al. v. Strahan*, 444.
8. In appeals from justices of the peace it is not necessary for the parties to make up an issue upon paper, and where the defendant relies on a tender, it is competent for the Court to require him to prove every fact, necessary to make out such a plea formally pleaded. And where in such case the word "tender," is found written in the transcript, but not signed by counsel, it cannot be intended that it was received by the plaintiff as a plea, and thus preclude him from insisting at the trial that the money was not in Court. *Harbin v. Knox*, 675.

ARBITRATION AND AWARD.

1. A submission to arbitration, which speaks of an action for a false imprisonment, will include an action on the case for the malicious use of process.—*Burns v. Hindman.* 531.

ARBITRATION AND AWARD—(CONTINUED.)

2. An award which discharges each from all demands of the other, and dismisses all suits, is not conditional, but is conclusive in favor of, and against each of the parties.—*Ib.*

ASSUMPSIT, ACTION OF.

1. Where money is paid to a director by order of the board, not authorized by law, the Bank may recover it as so much received to its use. *Branch Bank at Mobile v. Collins*, 95.
2. An appropriation and payment by the board of directors of the Branch Bank at Mobile, to an individual director, for extra services, performed by him in the interior counties of the State, is not warranted by law; and the amount thus paid may be recovered from him by the Bank. *Branch Bank at Mobile v. Scott*, 107.
3. An action on the case, and not assumpsit, is the proper remedy where the purchaser has accepted a deed for lands, and he has been defrauded by the omission to inform him of an outstanding incumbrance created by the vendor. *Morgan v. Patrick & Smith*, 185.
4. If an administrator, after removal from the administration, collects money recovered by him as administrator, it is money had and received to the use of the administrator *de bonis non*, who may sue the former administrator in assumpsit. *Salter v. Cain*, 478.
5. An action for money had and received will lie to recover back money paid upon a judgment which has been since reversed, unless the retention of the money by the defendant, is consistent with equity and good conscience. But the equitable right to retain must grow out of, or be connected with the case in which the judgment is vacated; if the defendant has another cause of action in which he will be entitled to recover as much as he retains, he must become the actor in a suit, and have his damages ascertained by a judgment. *Dupuy* v. *Roebuck*, 484.
6. A declaration in an action against an attorney, charging a neglect of professional duty, or even impropriety of conduct, if it set out an undertaking by the defendant to collect money, and alledge a promise to make good the loss resulting from the breach thereof, is a declaration in *assumpsit*. *Cook & Lamkin* v. *Bloodgood, use, &c.*, 683.
7. Where an overseer employed at a stipulated sum *per annum*, is sick a part of the year, so as to unfit him for active duty, but he is permitted to remain in the service of his employer up to the end of the year he is entitled to a *pro rata* compensation. If the defendant has been injured by the imperfect performance of the overseer's undertaking, the damages may be recouped, so as to compensate the injury. *Hunter* v. *Waldron*, 753.

See Contract, 6.

See Executors and Administrators, 5, 8.

ATTACHMENT.

1. It would be the duty of the Court in which such suit is brought, upon being certified of a pending attachment for the same debt, to stay the proceedings until the attachment suit is determined; and after judgment, if no plea had been interposed, or an ineffectual effort had been made to plead the fact in abatement, to stay the execution until the attachment was determined, upon a satisfactory indemnity being executed by the garnishee. *Crawford* v. *Clute & Mead*, 157.

ATTACHMENT—(CONTINUED.)

2. Under the attachment law, an action on the case may be sustained, either for wrongfully or vexatiously suing out an attachment; and the existence of malice is important only in connection with the amount of damages. *Kirksey* v. *Jones*, 622.
3. Where an attachment is wrongfully sued out, the defendant, whose goods are attached, may recover the damages actually sustained by reason of the levy; and if the process is vexatious as well as wrongful, he may recover as in an action for a malicious prosecution. *Ib.*
4. An averment that the attachment was sued out without any reasonable or probable cause, and for the purpose of vexing or harassing the party, is equivalent to the assertion that it was wrongfully and vexatiously sued out. *Ib.* 623.
5. It is a full defence to an action for wrongfully and vexatiously suing out process of attachment, if any one of the causes which warrant that process actually existed, when it was sued out, although another and different cause is set out in the affidavit. *Ib.*
6. The statute which authorizes an attachment in favor of a resident citizen, against the executor, or administrator, of his deceased non-resident debtor, can only be levied on the property of the deceased within this State, which has not come to the possession of his personal representative, so as to be assets in his hands. *Loomis, adm'r.* v. *Allen*, 706.
7. When such an attachment is improperly sued out, it must be abated by plea, and cannot be taken advantage of after a judgment by default. *Ib.*
8. The proper judgment in such a case is the condemnation of the property levied on, for the satisfaction of the debt; and if replevied by the administrator, then against him personally, to be discharged by the delivery of the property. *Ib.*
9. Where the judgment is *de bonis propriis*, in such a case, and not in the alternative, it will be amended in this Court, at the cost of the plaintiff in error. *Ib.*
10. When an attachment is sued out on a debt not due, the cause is continued by operation of law, until the maturity of the debt, without any formal continuance being entered. *Allen* v. *Claunch*, 788.

See Abatement, 5.
See Attorney at Law, 1, 2.
See Case, Action on the, 1.
See Garnishment, 4.
See Witness, 3.

ATTORNEY AT LAW.

1. An attorney at law intrusted with a note for collection by suit, is authorized to sue out the process of attachment; and his client is liable for the actual damages sustained, if the process is wrongfully sued out, although he may have instructed his attorney to use proper means only. *Kirksey* v. *Jones*, 623.
2. The client is only liable to the same extent, if the attorney acts maliciously as well as wrongfully. *Ib.*
3. *Semble*—If one of the attorneys, who are practising law in partnership, receive his own notes of a debtor against whom the firm are intrusted with a demand for collection, in satisfaction thereof, he will be liable to his copartner for any injury he may sustain as a consequence of the act. *Cook & Lamkin* v. *Bloodgood, use, &c.* 683.

ATTORNEY AT LAW—(CONTINUED.)

4. An attorney is not authorized to receive his own or any other person's note in payment of a debt placed in his hands for collection; and if notes are received by a sheriff in satisfaction of an execution, either with or without the direction of the attorney, the return may be vacated on motion, and another execution issue. *And semble*—if the notes were received without the attorney's approbation, the sheriff would be liable, if with it, then the attorney would be liable: either of these remedies the creditor may pursue according to the facts. *Ib.* 684.

5. *Semble*—Where an attorney is subjected to damages in consequence of the neglect, or improper conduct of his copartner, in the collection of a debt due by judgment, he will be remitted to the remedy by execution, to which the plaintiff was entitled. *Ib.*

See Assumpsit, Action of, 6,

BANK.

1. A director of the Branch Bank at Mobile receiving the compensation provided by law as such director, cannot make a contract with the board for compensation for extra services, whilst he continues a member of the board of directors.—*Branch Bank at Mobile v. Collins*, 95.

2. An order of the board of directors allowing a compensation of $1,000, each, to the members of the board, constituting the "Real Estate Committee," is illegal and void.—*Ib.*

3. The board of directors may compensate one of their number for services rendered to the Bank previous to his connection with it as one of its directors.—*Ib.*

4. Where work was done by other mechanics for the Bank, under the superintendance of one of the board of directors, the board might lawfully direct the compensation to be paid to him for the use of those doing the work.—*Ib.*

5. Where money is paid to a director by order of the board, not authorized by law, the Bank may recover it as so much received to its use.—*Ib.*

6. An appropriation and payment by the board of directors of the Branch Bank at Mobile, to an individual director, for extra services, performed by him in the interior counties of the State, is not warranted by law; and the amount thus paid may be recovered from him by the Bank—*Branch Bank at Mobile v. Scott*, 107.

7. Where the debtor of a Bank, against whom the summary remedy (provided in such cases) has been prosecuted, pleads to the merits, and a verdict and judgment are rendered against him, he cannot object that the notice is defective, if it shows *prima facie* that he is indebted to the plaintiff; *Semble*—where a motion is the initiatory process for the collection of a debt, it is not scanned with the same strictness as a declaration, or notice against an officer for default in the performance of his duty.—*Crawford* v. *Branch Bank at Mobile*, 205.

8. It cannot be judicially known, that a person who was elected by the Legislature as one of the directors of a Bank, was appointed by the board its president *pro tem.*, merely because he certifies that a debt sought to be recovered by notice, is *bona fide* the property of the Bank. *Ib.* 206.

9. Under the act of December, 1841, a note payable to B. G. cashier, and described in a notice under the statute by the State Bank or Branch Banks, is sufficient to show that the title is in the Bank. *Crawford, et al. v. Branch Bank at Mobile*, 383.

BANK—(CONTINUED.)

10. Courts will, *ex officio*, take notice of the returns made by Bank agents, in the same manner as they do returns by the sheriffs. *Ib.*

11. Where the record in a suit by motion recites "that the certificate of William R. Hallett, its president was produced, &c." and no objection is made in the Court below to the testimony by which the fact is established, it will in this Court be sufficient, as it is not necessary that the Court should recite the evidence by which a fact is ascertained. *Lester v. The Bank of Mobile*, 490.

12. A note discounted by the Bank after its maturity carries the legal rate of interest. *Ib.*

See Intendments and Legal Presumptions, 11.

See Limitations and Non-claim, Statute of, 8.

See Notice, 1, 2.

BANKRUPT AND BANKRUPTCY.

1. During the interval which must elapse between the interlocutory and final decree in bankruptcy, the bankrupt has an inchoate right to the property which he may acquire during such interval. But as the creditors have also the right until the final decree and certificate granted to coerce payment of their demands, and may therefore seize such property by execution, a Court of Chancery will interfere and by injunction protect the bankrupt in the enjoyment of such property, until it can be ascertained whether he will obtain his discharge, the creditor being protected by an adequate indemnity. *Mosby* v. *Steele & Metcalfe*, 299.

2. A factor empowered to sell cotton, who converts the proceeds to his own use, is not precluded by the act of Congress from taking the benefit of its provisions as a bankrupt. The "fiduciary capacity" there spoken of, is a trust proper. *Austill & Marshall* v. *Crawford*, 335.

3. A voluntary bankrupt is not a competent witness for the assignee in bankruptcy, to establish a debt due the bankrupt. *Cromwell & Johnson, Adm'rs.* v. *Comegys*, 498.

4. *Quere*—Upon an affidavit of fraud, as required by a statute of this State, cannot a *Ca. Sa.* issue against a certificated bankrupt, and in order to his discharge, is it not necessary that he should have a verdict in his favor, upon an issue of fraud *vel non?* *Robb* v. *Powers, et al.* 658.

See Appeals and Certiorari, 6.

See Executions, Writ of, 17.

BILLS OF EXCHANGE AND PROMISSORY NOTES.

1. A writing in the form of a promissory note for the payment of a sum of money, "in the common currency of Alabama," is not an undertaking to pay a sum expressed in coin, but in bank notes, which was the common currency of the State when the writing was made; consequently it is inadmissible under a declaration describing it as a promissory note for the payment of a sum *in numero*, and unassisted by other proof, it will not sustain a recovery upon the common counts in assumpsit. *Carlisle* v. *Davis*, 42.

2. Where commercial paper is placed in the hands of a notary for demand and protest, if he has not given notice to the drawer and indorsers, he must inform the holder with all reasonable despatch what he has done; and if he has under-

BILLS OF EXCHANGE AND PROMISSORY NOTES—(CONTINUED.)

taken to give notice, he must perform this duty in such a manner as not to prejudice the holder's rights. *The Bank of Mobile* v. *Marston*, 108.

3. Where the maker of a note who has indemnified his indorser, afterwards shows the note to the latter, telling him that he has paid it, and demanding a release of the indemnity, which is accordingly done; if the note has not been paid, the holder cannot excuse the want of notice to the indorser by showing that he had been indemnified. *Ib.*

4. When the liability of an indorser has not been fixed by notice, the fact that he has taken an indemnity from the maker, after the maturity of the note, will not have the effect to charge him on the indorsement. *Lowry's Admr's* v. *The Western Bank of Georgia*, 120.

5. It is not enough to show that notice was sent through the post office addressed to the drawer of a bill at a particular place, but it should be proved that he resided there, or that that was the place at which notice should have been addressed to him. *Crawford* v. *Branch Bank at Mobile*, 205.

6. Each party to a bill has, until the day after he has received notice of its dishonor, to give or forward notice to his prior indorser, and so on until the notice has reached the drawer. *Ib.*

7. The notary protesting a bill may send notices to the holder to be given to the prior parties, but the person to whom the notices are sent must appear to be the holder, or perhaps it may be sufficient to show that he is his agent; in transmitting the notice made out by the notary, the holder is not bound to use a greater degree of diligence, than if he had prepared and forwarded notices in his own name. *Ib.*

8. Where a notice of the dishonor of a bill identified it with *reasonable* certainty, and there being no evidence to show that the party to whom it was given, could have been misled, the Court might have informed the jury, that, if they found the other facts in respect to the notice in favor of the plaintiff, the notice itself in the absence of countervailing proof sufficiently identified the bill. *Ibid.* 206.

9. A note made by one executor of an estate and also by a third person as his surety, payable to the executors of the same estate, cannot be enforced against the surety by a suit at law, where the principal debtor in his character of joint executor is one of the plaintiffs. *Chandler, et al.* v. *Shehan*, 251.

10. Although in general commercial paper in the hands of the holder imports a consideration as between the original parties to it, yet when it is shown, that it was made without consideration, or that it has been fraudulently and improperly put into circulation, the holder cannot recover without proving that he acquired the paper before it was dishonored, upon a valuable consideration. *Thompson* v. *Armstrong, use, &c*, 256.

11. A note payable to the cashier of a Bank in the hands of one who does not derive title from the Bank, imports on its face that it was made without consideration to be negotiated in Bank. *Ib.*

12. Where the actual holder of a bill of exchange resides in a different town from that which is the residence of the parties sought to be charged, the notice of nonpayment may be given through the post office, by an agent of the holder to whom the bill is transmitted for collection, although the agent and the party notified both reside in the same place. The head note of Foster v. McDonald, 5 Ala. Rep. 376, corrected and explained. *Gindrat, et al.* v. *The Mechanics' Bank of Augusta*, 324.

BILLS OF EXCHANGE AND PROMISSORY NOTES—(CONTINUED.)

13. It is competent for a Bank, by custom or usage, and consequently by rule, to establish a mode for giving notice to charge the parties to a bill, different from that which obtains in the general commercial law; as for instance, to provide that notice may be sent by the post, even where all the parties reside in the same place, and such a custom, &c., will be binding on the parties to a bill made payable at the particular Bank. *Ibid*, 325.

14. It is not necessary to state the existence of such usage or rule in the declaration. The fact alledged, is, that notice was given, and this is proved by either the one mode of notice or the other. *Ib.*

15. Where one procures bills to be drawn for his accommodation, and afterwards executes a deed of trust as a security to the acceptors, to secure promissory notes which are given as well for the amount of the accepted bills, as for an amount due the acceptors, on account stated; the holders of the bills may resort to the trust property for the payment of them when dishonored, if the promissory notes have not been negotiated to *bona fide* purchasers, for a valuable consideration. *Toulmin, et al.* v. *Hamilton. et al.* 362.

16. An agreement contained in the body of a note, purporting to be in consideration of the hire of slaves, to return the slaves clothed, as slaves usually are, is not assigned by the indorsement of the note, nor can the assignee maintain an action for the breach of it, when suing for the money due on the note. *Winston* v. *Metcalfe*, 837.

17. Six persons drew a bill of exchange, upon which the money was received by them, and at the same time executed an instrument, in which they recited, that the bill was drawn for the mutual benefit of all the parties to it, and agreeing, that each would bear an equal proportion in its payment, each paying his separate portion;—one having been compelled to pay all, and three of the parties being insolvent: *Held*, that each was surety for the others, for all above his own interest in the bill, and co-sureties, for all above the sum they were individually liable for; that therefore in this proceeding the one, who had paid the entire debt, could recover of one of the solvent parties, one sixth part, being the part for which he was individually responsible, and one-third part of the portion of the three insolvent parties, making in all, one-third part of the entire amount. *Martin. Adm'r.* v. *Baldwin*, 923.

See Chancery, 20.
See Conflict of Laws, 1.
See Consideration, 4.
See Gaming, 3.
See Notaries Public and Protests, 2, 5.
See Set Off, 1.
See Trust and Trustee, 6.

BOUNDARY.

1. When the length of a line is written across a plat, which accompanies a grant of land, it will not control the boundaries, which are expressly declared upon the face of the grant. *Hallett and Walker* v. *Hunt*, 882.

CASE, ACTION ON THE.

1. There is no distinction, as to the time when, a suit may be instituted for the abuse of the process between original and ancillary attachments. *Kirksey* v. *Jones*, 623.

See Attachment, 3, 4, 5.

CHANCERY.

1. A Court of Chancery may refuse to rescind a contract, where it would not specifically enforce it at the suit of the other party. *Beck* v. *Simmons & Kornegay*, 71.
2. Where a mistake is made in the description of lands in a deed. which the party offers to rectify, there is no ground for the interposition of Chancery to correct the mistake. *Ib.*
3. Where matters of account between the complainant and defendant are complicated, embracing the transactions of several years, relating to the employment of several steamboats on their joint account, and made up of many charges, for and against each other, a Court of Equity may entertain the complainant's bill for a settlement of accounts, and the recovery of a balance. *T. & J. Kirkman, et al.* v. *Vanlier*, 217.
4. *Quere?*—When a demand is primarily enforceable in equity, is it not competent for the complainant in such case to ask a decree against his debtor, and in the same bill to seek to subject debts due to the latter to its payment. *Ib.*
5. The remedy by attachment, for the recovery of a legal demand being given by statute to one non-resident against another, Courts of Equity by analogy must afford the same facility of collection to a creditor whose claim is of an equitable nature. *Ib.*
6. A bill of interpleader will lie though the complainant be not actually sued, or be sued by one only of the conflicting claimants, or though the claim of one defendant be actionable at law, and the other in equity. *Gibson, et al.* v. *Goldthwaite*, 281.
7. Where one person *as the agent of another*, receives money which is claimed by a third person, who gives notice of his claim, a bill of intepleader will not lie; for a mere agent cannot by notice be converted into a trustee: But it seems that a bill of interpleader, as between principal and agent was admissible, where the the claim was under a derivative, and not under an adverse title. *Ib.*
8. An attorney at law who has collected money, may file a bill of interpleader in respect to the same, against defendants who set up a derivative claim from the person for whom the attorney undertook the collection; and this, although he may be entitled to retain a part of it to compensate his services. *Ib.* 282.
9. The defendants to a bill of interpleader will not be permitted to object on error, that a third person was not made a defendant also, where the want of such a party could not in any manner affect their rights. *Ib.*
10. During the interval which must elapse between the interlocutory and final decree in bankruptcy, the bankrupt has an inchoate right to the property, which he may acquire during such interval. But as the creditors have also the right until the final decree and certificate granted to coerce payment of their demands, and may therefore seize such property by execution, a Court of Chancery will interfere and by injunction protect the bankrupt in the enjoyment of such property, until it can be ascertained whether he will obtain his discharge, the creditor being protected by an adequate indemnity. *Mosby* v. *Steele & Metcalfe*, 299.

CHANCERY—(CONTINUED.)

11. The Chancery Court of the State in which the debtor resides, and not the Federal Court, is the proper tribunal to afford relief. *Ib.*

12. To entitle a judgment creditor to go into Chancery to subject the equitable estate of his debtor to the satisfaction of his judgment, (if he has no lien,) he must exhaust his legal remedy, viz: he should show that an execution issued and was returned "no property found." *Roper* v. *McCook and Robertson's adm'r*, 319.

13. Where a bill is filed by the holder of a bill of exchange, to subject a trust fund, which the principal debtor has placed at the disposal of the accommodation acceptor, it is not necessary to alledge that the holder has exhausted his legal remedies on the bill. It is only a creditor at large, who is required to show a lien established, by suing out execution. *Toulmin, et al* v. *Hamilton, et al.* 362.

14. Where several persons are interested in the distribution of a trust fund, this is a sufficient privity to warrant their being made parties to the same bill, either as plaintiffs or defendants. *Ib.*

15. When a bill discloses that one holding a bill, to the owner of which the right of distribution attaches, has the possession merely, and that the ownership is in another, that other is the proper party, and not the one who has the possession merely; but the omission of such a party is no reason to dismiss a bill for want of equity. *Ib.*

16. Although a mortgagee may have purchased in the equity of redemption, he has the right to apply to a Court of Chancery for a foreclosure, and to quiet his title, as a Court of Chancery always looks with suspicion upon such transactions. To such a bill, the administrator, if the estate has been declared insolvent, is a necessary party, to enable him to show, if he can, that the equity of redemption has been purchased at too low a rate, or a fraud in the sale. *Heirs and adm'r of Hitchcock* v. *The United States Bank of Pennsylvania*, 388.

17. A sheriff against whom a judgment is rendered for failing to make a return upon an execution, cannot have relief in Chancery, upon the ground alone that the defendant in execution was insolvent. *Chandler* v. *Crawford*, 507.

18. A plaintiff in execution having obtained a judgment against a sheriff, for failing to return the execution, the latter, may in equity, set off a debt due him from the former, he being insolvent, and the debt not being a legal set off, on the motion against the sheriff. *Ib.*

19. When all the indorsers on the bill have indorsed it for the accommodation of the acceptor, and he executes a deed of trust for the indemnity of the two last indorsers, the first indorser is not entitled to enjoin the collection of the bill against them on the ground that they refuse to sell the trust property and apply it to the bill. He can only be subrogated upon paying the bill. *Dunlap* v. *Clements, et al.* 539.

20. Where the creditors of a vendor, levy executions on the property in the hands of the vendee, Chancery will not interpose at the instance of the latter, as he has an adequate remedy at law, by a trial of the right under the statute, or by an action for the trespass. *Gunn* v. *Harrison*, 585.

21. In general, a bill of peace cannot be sustained, until the complainant has ascertained his right at law. *Ib.*

22. A Court of Chancery will not interfere, and prevent the creditors of a vendor from pursuing the property in the hands of the vendee, because the vendor has other property in his hands sufficient to satisfy their debts, which by his contract, he should have delivered to his vendee. *Ib.*

CHANCERY—(CONTINUED.)

23. A Court of Chancery will not repudiate a bill to enjoin a judgment, because the record of the cause at law discovers an error, for which the judgment is reversible, although the case is one, of which independent of this ground, the jurisdiction of equity is unquestioned. *Reynolds* v. *T. & W. Dothard, et al.* 664.

24. One whose name has been forged as a surety, to a bond for an appeal, on which (by statute) a judgment has been rendered without notice, may go into equity and enjoin the execution, upon the ground that the use of his name was unauthorized. *Ib.*

25. A Court of Equity may relieve against the fraudulent silence of the vendor, by which the vendee, failed to obtain a portion of the land he supposed he was buying, and the vendor was selling. *Moore, et als.* v. *Clay*, 742.

26. M. offered for sale, to C., his tract of land, lying in Ashburn Cove, containing about nine hundred and eighty-two acres, at $8,000, and a day was appointed for its examination. C. accordingly went, and distrusting M. procured one of the neighbors to show him the lands. The next day the parties met to close the contract, and upon C. putting down the different parcels, amounting to nine hundred and twenty acres, remarked to M. that there was not as much land as he had represented—to which M. replied, by asking him if it was not worth what he asked for it: *Held*, that as it was satisfactorily shown, by the circumstances, and by the proof, that M. knew that C. had omitted a portion of the tract he supposed he was buying, his omission to disclose the fact was a fraudulent concealment, and that a Court of Equity would relieve against it. *Ib.*

27. Where one purchases land and pays the purchase money, and is afterwards held to be a purchaser with notice of a prior purchase, a Court of Chancery is not compelled to decree the purchase money unpaid, to the vendor, and the rents and profits to the vendee, but may decree that these sums shall *pro tanto* extinguish each other, and put an end to the litigation, by decreeing also as between the defendants. *Ib.*

28. When the allegations of a bill leave it uncertain whether a mortgage, sought to be foreclosed, was executed by two of the defendants, or by one of them only, and the evidence in the cause does not remove the uncertainty the objection is available on error, although no demurrer for this cause is interposed: but a reversal for such a cause carries no costs. *McGowan, et al.* v. *The Branch Bank at Mobile*, 823.

29. A power of sale given by the mortgage, does not divest a Court of Equity of jurisdiction to decree a sale. *Ib.*

30. Where a Court of law in which a party has instituted an action, upon the allegation that a suit pending in equity is for the same identical cause, makes an order that he elect, whether he will proceed at law, or in Chancery; such order will not be conclusive of the case in Chancery, but the Chancellor will be free to exercise his own judgment upon the motion to elect: and this, although a forced election shall have been made and entered of record at law. *The Planters and Merchants' Bank of Mobile* v. *Walker, et al.* 926.

31. The bill alledged that several conveyances were made by the defendants to a judgment at law, of all their visible property, that several of these conveyances were fraudulent in their inception, that others were either conceived in fraud, or held up with the view of delaying or defeating the creditors of the grantor: *Held*, that these allegations were sufficient to give to a Court of equity jurisdiction of the cause. *Ib.*

CHANCERY—(CONTINUED.)

32. Where executions are levied on property, which the defendant in execution had sold and mortgaged, the plaintiff may notwithstanding go into equity in order to vacate the conveyances *in toto;* the only effect of the levies on the remedy in Chancery, would be, upon the interposition of a claim of property, to compel the plaintiff to elect (if the matters in controversy were identical,) whether the suit should be prosecuted at law, or in equity. *Ib.*

33. Although it may be necessary to entitle a judgment creditor to come into equity to subject the equitable estate of his debtor, that he should have pursued his legal remedies to every available extent, without being able to obtain satisfaction; yet he may file his bill, upon the assumption that the defendants in execution have made several gratuitous or voluntary transfers of property, with the intent to *delay, hinder or defraud creditors:* or where, admitting the conveyances were made to secure debts which have since been paid, they are now held up to enable the grantor to defraud his creditors. *Ib.*

See Deeds of Trust, 11.

See Dower, 4.

See Mortgagor and Mortgagee, 5.

See Orphans' Court, 6, 13.

See Penalty, 1.

See Practice in Chancery, 1, 2, 3, 4, 5, 6, 23.

See Trust and Trustee, 4.

See Vendor and Vendee, 6, 11.

COMMISSION MERCHANTS AND FACTORS.

1. When in the absence of any special authority for that purpose, the cotton of a planter, is sold by his factor, in connection with that of others at a round price, the planter is entitled to the price it actually sold for, unless a usage of trade exists, authorizing sales to be so made, and the cotton of each planter to be scaled according to its relative value. Whether such a usage is valid—*Quere?* *Austill & Marshall* v. *Crawford*, 335.

2. Proof "that it was very common in the trade, but that a few factors in Mobile would not do so," is not proof of a usage of trade. *Ib.*

3. A factor having sold the cotton of his principal, contrary to instructions, and being directed to ship to Liverpool, concealed the fact of the sale from his principal, and procured other cotton of a similar quality, which he shipped in the name of his principal, to Liverpool, where it was sold, and the net proceeds received by the planter: *Held*, that he was entitled to recover the difference between the price in Liverpool, and the price his cotton was actually sold at in Mobile. *Ib.*

4. When a factor disobeys instructions, he is responsible to his principal for the loss actually sustained thereby. When therefore a factor is directed not to sell unless he obtains a certain price, and he notwithstanding sells for a less price, the measure of damages is not the price thus affixed to the article by the principal, but the price at which it might have been sold during the season. *Ib.*

5. If a factor without instructions ships the cotton of his principal, he is responsible for any loss occasioned thereby, unless the principal on being informed of the shipment ratifies the act. *Ib.*

See Contract, 5.

CONDITIONAL SALE.

1. A bill of sale, with a defeasance, that if the purchase money is repaid at a stipulated time, the slave will be delivered, is on its face a conditional sale and not a mortgage. *Eiland, adm'r,* v. *Radford,* 724.

See Mortgagor and Mortgagee, 8, 9.

CONGRESS, ACTS OF.

1. A grant may be made by a law, as well as by a patent pursuant to a law; and a confirmation by a law, is as fully to all intents and purposes a grant, as if it contained in terms a grant *de novo.* *Hallett and Walker et al.* v. *Doe ex dem. Hunt, et al.* 882.

See Land Titles South of Latitude 31—1, 2, 3, 4, 5, 6, 7.

CONFLICT OF LAWS.

1. A note payable at the Western Bank of Georgia, is indorsed in Alabama; the indorsement is governed by the laws of Alabama, although the note and indorsement were made with the intention that it should be negotiated in Georgia, and with a view to be performed there. *Lowry's adm'rs* v. *The Western Bank of Georgia,* 120.
2. Henry Hitchcock, a resident of Mobile, indebted to the Pennsylvania Bank of the United States, went to Philadelphia, and whilst there, proposed to the directory of the Bank, to advance him a further sum of money in Mobile; agreeing, upon that condition, to execute his bonds payable by four yearly instalments, for the entire debt, with interest, at eight per cent. per annum, payable in the city of New York; and also upon the receipt of the money, to execute a mortgage to secure the entire debt upon real estate in Alabama. The Bank acceded to the proposition, and appointed an agent to execute it on their part. The contract was executed by both parties; the Bank delivering the money, and Mr. H. executing his bond and mortgage in Mobile: *Held,*—First—that the proposition made in Philadelphia was not the contract of the parties, but a proposal to make a future contract, which was afterwards executed in Mobile, and which must be considered as the place of the contract.

   Second—that as no intention appeared to violate or evade the usury law of New York, the contract, though the money was payable there, was not void, notwithstanding, by the law of that State, all contracts for the payment of money, reserving a higher rate of interest than seven *per cent. per annum,* were declared invalid.

   Third—that the mortgage given to secure the payment of the debt, could be foreclosed in Alabama. *Heirs and adm'r of Hitchcock* v. *The U. S. Bank of Penn.* 386.
3. A foreign corporation, exercising one of its corporate functions by the comity of this State, within its limits, must conform itself to our laws. A prohibition in the charter, that it shall not, within the State of its creation, take more than six per cent. *per annum,* on its loans or discounts, does not follow it into a foreign State, by whose comity it is permitted to make contracts. *Ib.* 387.

See Executors and Administrators, 13, 14, 15, 16.

CONSIDERATION.

1. Where the vendor of property receives from the vendee a promissory note (indorsed by the latter) for an amount larger than the purchase money, and gives

CONSIDERATION—(CONTINUED.)

his own note payable at a day certain for the excess, to entitle the vendor to insist upon the want of consideration when sued on his note, it is not necessary, that he should release the vendee from his indorsement to a corresponding extent; if the defence is successful the plaintiff may claim a deduction from his liability as indorser. Nor will the pendency of a suit, by the vendor (as indorsee) against his indorser, in any manner prejudice the defence; such an action may be maintained to recover the price of the property sold. *Litchfield* v. *Allen & Falconer*, 779.

2. One person entered into a contract with another, by which he was to receive his promissory note without surety, and the note was made and received; afterwards the payee called upon the maker for a surety, who accordingly took the note, had it subscribed by a third person, and returned it to the payee: *Held*, that as there was no new consideration as between the payee and principal, and none whatever, as it respects the former and the surety, the undertaking of the latter could not be enforced. *Jackson's Adm'r* v. *Jackson and another*, 791.

3. Under the pleas of failure and want of consideration, the defendant may prove, that a note sued upon, though absolute in its terms, was given as an indemnity to the plaintiff, against loss as surety, as it is merely proving, upon what consideration the note was given. *Laroque & Hatch* v. *Russell*, 798.

4. When a note made upon a gaming consideration, is transferred in payment of a debt, an action may be maintained upon the consideration of the original debt, without proof of any diligence to recover the amount of the note from the maker. *Lake* v. *Gilchrist*, 955.

5. When the note of an insolvent man is passed off in the payment of a debt, and the insolvency is artfully concealed, by any stratagem, or unfair practice, an action may be maintained upon the original consideration. *Ib.*

See Principal and Surety 3.

CONTRACT.

1. A director of the Branch Bank at Mobile receiving the compensation provided by law as such director, cannot make a contract with the board for compensation for extra services, whilst he continues a member of the board of directors. *Branch Bank at Mobile v. Collins*, 95.

2. Where work was done by other mechanics for the Bank, under the superintendance of one of the board of directors, the board might lawfully direct the compensation to be paid to him for the use of those doing the work. *Ib.*

3. An agreement by the vendee of slaves to return them and pay such sum of money on demand as is equivalent to their depreciation, forms a sufficient consideration for the rescission of the sale. *Lightfoot et al.* v. *Strahan*, 444.

4. Where upon an agreement to rescind a sale, it was incumbent on the vendee to do the first act in order to consummate the rescission, if he has omitted to do any thing, he cannot resist the payment of the purchase money by setting up the agreement. *Ib.*

5. When a father directs the proceeds of certain bales of cotton to be applied by his factor in payment of a specific debt of his son, he is warranted in countermanding the direction, at any time before the factor has thus appropriated the money, or entered into an engagement with the creditor, who is the object of the remittance, to hold it for his use. *Walton* v. *Tims, Bigelow & Caldwell*, 470.

CONTRACT—(CONTINUED.)

6. It seems that when two workmen agree with a third person to build a dam and mills, the mills to be built by one, and the dam by the other, and the whole work to be paid for out of the profits of the mills for one year, no action between the workmen can be brought on this contract for a failure or violation of it. *Mahoney* v. *Chandlers*, 732.
7. Where an overseer employed at a stipulated sum *per annum*, is sick a part of the year, so as to unfit him for active duty, but he is permitted to remain in the service of his employer up to the end of the year he is entitled to a *pro rata* compensation. If the defendant has been injured by the imperfect performance of the overseer's undertaking, the damages may be recouped, so as to compensate the injury. *Hunter* v. *Waldron*, 753.
8. A promise to pay a sum of money, at a specified time, "which may be discharged in good leather" at a specified price, is a conditional contract, but becomes absolute, if the payee does not give notice of his intention to pay in leather. *Plowman & McLane* v. *Riddle*, 775.
9. Where there is a contract to pay a gross sum for tuition of pupils, and they are taken from the school before the expiration of the term, without any fault of the teacher, or the occurrence of some act rescinding the contract, he is entitled to recover the whole sum stipulated. *Sprague and Wife* v. *Morgan and Wife* 952.

See Deeds and Bonds, 2.

CORPORATIONS AND STOCKHOLDERS.

1. The debtor of a corporation may be garnisheed by a creditor of the corporation under the general law of garnishment; but no proceeding can be had under the act of 1841, to subject the debts of stockholders for stock due the company, on process of garnishment, issuing previous to the passage of that act. *De Mony, Garnishee*, v. *Johnston*, 51.
2. In the absence of authority conferred by the charter, by-laws, &c., the president of the directory of a banking corporation, cannot use its cash, or credits, &c., for the purpose of settling the demands of its creditors, &c.: and the seal of the corporation cannot impart validity to an unauthorized transfer by its president. *Gibson, et al.* v. *Goldthwaite*, 282.
3. An assignment made under the resolution of the directory of a banking corporation, for a purpose within the scope of their powers is *prima facie* valid. *Ib.*
4. A foreign corporation, exercising one of its corporate functions by the comity of this State, within its limits, must conform itself to our laws. A prohibition in the charter, that it shall not, within the State of its creation, take more than six per cent. *per annum*, on its loans or discounts, does not follow it into a foreign State, by whose comity it is permitted to make contracts. *Heirs and Adm'r of Hitchcock* v. *U. S. Bank of Penn.* 387.
5. The requisition in the charter of the Selma and Tennessee Rail Road Company, that "five dollars in cash shall be paid on each share, at the time of subscribing," is not a condition precedent to becoming a "subscriber" in the company. And if instead of exacting the money, the commissioners appointed to receive the subscriptions, take a promissory note for the amount, from a subscriber, he cannot after the company is organized. object that he is not a member of the corporation. The amount may therefore be recovered of him, in an action of assumpsit, by the corporation. *Selma and Tennessee Rail Road Company* v. *Rountree*, 670.

COSTS.

See Abatement, 2.

See Executors and Administrators, 1.

COURT, CHARGE OF.

1. Where the Court charged the jury, that a power of attorney, before them, conferred the authority to execute the note on which the suit was brought, unless the same was revoked, which they were to ascertain from the evidence before them, the charge is not objectionable, as referring to the jury the decision of the legal question, viz: what amounts to a revocation? *Knapp* v. *McBride & Norman*, 20.
2. The *neglect* or *omission* of the judge to instruct the jury on some material point, though it might sometimes furnish just grounds for a new trial, will not warrant a reversal of the judgment. *Ib.*
3. Evidence being given of a former possession of land by a defendant in execution, accompanied by acts of ownership; and proper evidence being shown of the sale and conveyance of all his right, under a sale by the marshal of the United States, by virtue of a judgment and execution, it is not an assumption of a fact for the Court to charge the jury, that his possession and improvements vested in him such a legal title, as to enable him to maintain ejectment against one ousting him. *Badger* v. *Lyon*, 564.
4. When the charge excepted to is affirmative, and given by the Court of its own motion or at the instance of the other party, it is unnecessary to set out the evidence on which the charge is founded. *Kirksey* v. *Jones*, 623.
5. Where a claimant makes title to a slave through a deed, it should, if proved, be left to a jury, although the title of the other party may have been complete by adverse, or other possession, or because the deed itself is inoperative, by the omission to record it. These are matters of instruction to the jury, not of exclusion from it. *Carters'* v. *Mannings & Jackson*, 851.

COURT, CIRCUIT.

1. After a Circuit Court has disposed of the business before it, it need not continue its session until the expiration of the term as limited by law, although a jury may be deliberating upon their verdict in a criminal prosecution for a capital offence; in such case the Court is only bound to afford a reasonable time for the jury to agree upon a verdict; and if the record does not show the reverse, it will be intended that the session continued thus long. *The State ex rel. Battle*, 259.

COURT OF ROADS AND REVENUE.

1. When a transcript from the Commissioners' Court discloses that the Court had jurisdiction over the subject, the time when it held its session cannot be inquired into collaterally. *Lewis, et al.* v. *The Intendant and Town Council of Gainesville*, 85.
2. If the Commissioners' Court meets at the proper time, it may adjourn to any day before the commencement of the next term, and is not required to adjourn from day to day until that time. *Ib.*

COVENANT.

1. In an action of covenant upon a general warranty, the averment that at the sealing and delivery of the deed, one N. had the lawful title, freehold and possession, of the land warranted, and still continues so to have, by reason whereof

COVENANT—(CONTINUED.)

the grantee is, and always has been, unable to recover the possession, shows a sufficient breach of the covenant, and is equivalent to the assertion of a legal ouster. *Banks & Ready, Executors of Sims* v. *Whitehead*, 83.

2. *Semble*—The plaintiff may recover in an action upon the covenant of warranty, though he voluntarily yielded to a dispossession, provided, the title to which he yielded was a good title, and paramount to that of the warrantor. *Dupuy* v. *Roebuck*, 484.

CRIMINAL CASES, AND PROCEEDINGS, IN.

1. Under an indictment for selling to a slave, without the consent of his master, one yard of cotton cloth, it is not necessary that the evidence should prove that the cloth sold was of cotton. *The State* v. *Newman & Levie*, 69.
2. In every criminal case, the defendant's guilt must be made out by evidence of a conclusive nature and tendency, and must exclude any reasonable supposition of innocence. *Ib.*
3. After a Circuit Court has disposed of the business before it, it need not continue its session until the expiration of the term is limited by law, although a jury may be deliberating upon their verdict in a criminal prosecution for a capital offence; in such case the Court is only bound to afford a reasonable time for the jury to agree upon a verdict; and if the record does not show the reverse, it will be intended that the session continued thus long. *The State, ex rel. Battle*, 259.
4. Where a prisoner will not appear in Court to hear the verdict which the jury announce themselves ready to render, the Court may order a mistrial; and a direction to them to erase their verdict, as it has no other effect than the mistrial itself, cannot prejudice the prisoner; and consequently he can claim no advantage of it. *Ib.*
5. Upon an indictment for a felony, the solicitor announced the State ready for trial, when the accused answered that they were also ready, no objection being made to the jury, the indictment was read to them, and the trial proceeded to its close; the judgment entry recited, that the prisoners were arraigned, pleaded *not guilty*, &c.: *Held*, that the refusal of the primary Court to strike out, on motion of the accused, so much of the entry as affirmed the arraignment and plea pleaded, was not an error; and that such a neglect in pleading was inferable, as authorized the Court under the ninth section of the eleventh chapter of the "Penal Code," to cause the plea to be entered. *Fernandez and White* v. *The State*, 511.
6. When the State demurs to the defendant's plea of *autrefois convict*, to an indictment for a capital felony, and the demurrer is overruled, this does not entitle the defendant to be discharged; nor is it irregular in such a case to permit the State to rejoin. *The State* v. *Nelson*, 610.
7. In an indictment for a capital felony the State and the defendant both announced themselves ready for trial; an issue was formed on the plea of the general issue, and a jury sworn and impanneled. There was also a demurrer to a plea of *autrefois convict*, which being overruled, the State was permitted to reply; the defendant rejoined and the State demurred. After this, the defendant was permitted to take issue on the replication, and to withdraw his rejoinder. At this stage of the proceedings the State was permitted to continue for want of testimony, relating to the issue last joined. The defendant objected, but the jury was discharged and dispersed. At the next term, the defendant was convicted;

CRIMINAL CASES, AND PROCEEDINGS IN—(CONTINUED.)

and moved these matters in arrest of judgment: *Held*, first—that an issue formed on a plea of *autrefois convict*, cannot be regularly submitted to the jury with the issue upon the plea of not guilty, but that the issues should be tried separately. Second—that the impanneling of the jury upon the plea of the general issue previous to disposing of the plea in bar, was an irregularity which could be obviated only by discharging the jury. *Ib.*

8. That such discharge under the circumstances of the case, was not equivalent to an acquittal, nor entitled the defendant to his discharge. *Ib.*
9. In an indictment for malicious mischief in killing a domestic animal, the name of the owner should be disclosed, or it should at least be stated that the animal *was the property of some one*, though the name was unknown; if there was no known proprietor, the killing will not constitute malicious mischief. *The State* v. *Pierce*, 728.

See Trespass, 1.

DAMAGES.

1. The measure of damages in an action against a notary for failing to give notice of the dishonor of paper according to his undertaking, must be graduated by the injury sustained by the neglect; in estimating which, the solvency of the party to whom the notice was given, is an important element. *The Bank of Mobile* v. *Marston*, 108.
2. In detinue for a cow and calf and fourteen hogs, it is not error, if the jury assess an aggregate sum as the value of the cow and calf, and another sum as the value of the hogs. *Haynes* v. *Crutchfield*, 189.
3. In the case of a battery of a slave, the jury may give vindictive damages, and are not confined to the actual loss sustained by the master. *Wheat* v. *Croom*, 349.
4. Where a title to slaves is dependant upon the default of the grantor in not paying a specified debt, if there is a default, the extent of it is an immaterial inquiry. *Bell* v. *Pharr, et al.* 807.

See Attachment, 3, 4.

See Attorney at Law, 1, 2.

See Contract, 7.

DEBT.

1. Debt is a proper form of action on an instrument, under seal, whenever a pecuniary demand, which can readily be reduced to a certainty, is sought to be recovered. *The Wetumpka and Coosa Rail Road Company* v. *Hill & Lockett*, 772.

DEBTOR AND CREDITOR.

1. A man in failing circumstances may prefer one creditor to all others, if there be no opposing liens upon his property; and a grantee who is influenced by honest purposes cannot be prejudiced by the *mala fides* of his grantor. *Stover* v. *Herrington, et al*, 143.
2. Where a title to slaves is dependant upon the default of the grantor in not paying a specified debt, if there is a default, the extent of it is an immaterial inquiry. *Bell* v. *Pharr, et al.* 807.

See Bills of Exchange and Promissory Notes, 9.

See Trust and Trustee, 3.

DEEDS AND BONDS.

1. The condition of a writ of error bond recited, that "that the above bound S. C., hath applied for and obtained a writ of error in a certain suit heretofore pending and determined in the County Court of Perry, in which the said S. C. is plaintiff in error, and the said W. J. is defendant in error, in a plea of trespass on the case, returnable to the next term of the Supreme Court at T. on the first Monday of June, 1844. Now, if the said S. C. shall prosecute his writ of error to effect, and pay and satisfy the judgment which shall be rendered in the said cause by the Supreme Court, then this obligation to be void; otherwise to be, and remain in full force and effect." The statute requires that the bond shall be "conditional for prosecuting the writ of error to effect, and to pay and satisfy the judgment which shall be rendered in the said case by the Supreme Court:" *Held*, that the condition of the bond sufficiently conformed to the act, and that the generality of the recital which preceded it, did not affect the bond as a statute obligation. *Weissinger & Crook, ex parte*, 710.
2. When articles of agreement under seal purport to be between the defendants of the first part, and the plaintiff of the second part, the non execution of the instrument by the plaintiff, will not prevent the defendants from being held liable. *The Wetumpka and Coosa Rail Road Company* v. *Hill & Lockett*, 772.

See Appeal and Certiorari, 4.

DEEDS PROBATE, OR REGISTRATION OF.

1. The deputy clerk may take the probate of a deed in the absence of his principal. *Kemp & Buckey* v. *Porter*, 138.
2. The consent of a beneficiary of a trust deed will not be presumed, where the deed postpones the payment of the secured debt, beyond the time when it fell due by the contract of the parties. *Ib.*

DEEDS OF TRUST.

1. Where the sale of property which had been conveyed by deed of trust, was, under the powers conferred, expedited, (with the assent of the grantor,) so as to prevent the interference of some of his creditors, who were prosecuting their claims to judgment; the grantor when sued by the purchaser at the trust sale for property sold, cannot for that cause defeat a recovery. *Haynes* v. *Crutchfield*, 189.
2. No inference of fraud arises upon a deed of trust, conveying property for a debtor as an indemnity to his sureties, from the circumstance that the property is to remain in the trustee's possession, until he may choose to sell, or be required to do so, by the beneficiaries of the deed. *Dubose* v. *Dubose*, 235.
3. Any execution creditor, independent of the statute right of payment, may compel creditors secured by mortgage or deed of trust, to close the trust by sale, and distribute the surplus, if any, will be the probable result of a sale; and, without such probability, upon indemnifying the other party against the costs of suit and sale. *Ib.*
4. A discretion given to a trustee, who is also the surety of the grantor, and for whose indemnity a trust is created, to pay first either of two debts, for both of which he is liable as surety, warrants no inference of a fraudulent intention *Ib.*
5. A direction in a deed of trust, which does not appear to have been made by an insolvent debtor, or one in failing circumstances, that the land conveyed by him

DEEDS OF TRUST—(CONTINUED.)

shall, until its sale under the trust, be cultivated by the slaves conveyed, and such others as the trustee may procure, does not make the deed fraudulent as against a creditor subsequently suing out execution. *Ib.*

6. A voluntary conveyance by a debtor to a trustee of lands and personal property for the purpose of securing the payment of debts, some of which are past due, and others are running to maturity—fixing a distant day after the maturity of the youngest debt—and providing, that until then the debtor shall continue in the possession and use of the property, applying the profits to the payment of the debts, is not materially different from a mortgage executed under the same state of facts; and when it does not appear by the deed that the debtor is in failing circumstances, the stipulation that he may remain in possession and use of the property, does not *per se* make the deed void. *Elmes* v. *Sutherland*, 262.

7. Neither is such a conveyance void *per se* from the circumstance, that the perishable articles are conveyed by it with a reservation of a use to the debtor until the time fixed by the deed as the law day. Such a stipulation is good between the parties, though it is possible it may have no effect against an attaching creditor. *Ibid*, 263.

8. Such a deed however is invalid to pass the title to the trustee until it is assented to by the creditors whose debts are intended to be secured by it. Until such assent, the deed operates only as the conveyance of a power which is revocable by the debtor; and the same effect is produced by the levy of an execution. *Ib.*

9. One, unembarrassed, may make what disposition he pleases of his property; therefore a deed of trust, or mortgage, which does not show upon its face that it was made in contemplation of insolvency, or that there are other creditors who may be prejudiced by it, cannot be considered fraudulent *per se*. *A. Pope & Son, et als.* v. *Wilson, et als*, 690.

10. To justify a Court in inferring that a deed was made with fraudulent intentions, where no fraud in fact is proved, two things at least must concur—there must be creditors known to the parties who may by the provisions of the deed be delayed, or hindered, in the collection of their debts, and the necessary consequence of the deed, must be, to produce such delay, or hinderance. *Ib.*

11. When a deed of trust, fairly made, becomes, by subsequent events, oppressive, or injurious, to other creditors, although such a condition of things would not affect the deed, which was valid at its inception, yet a Court of Chancery would direct the trust to be executed immediately, and after satisfying the purposes of the trust, pay over the residue to the other creditors. *Ib.*

12. A deed conveying a plantation, &c., to trustees, for the benefit of certain creditors of the grantor, is not void merely because it provides that the trustees may, *if they think proper*, permit the grantor to reside upon the plantation, and have the management thereof, under the supervisions of the trustees, until the growing crop is sold. *Planters and Merchants' Bank* v. *Clarke*, 765.

13. A deed conveyed in trust all the estate of a debtor, consisting of "lands, slaves, carriage, wagon, cart, mules, horses, hogs, cattle, all plantation and farming utensils, with the crop of corn, cotton and grain, growing on the plantation;" and provided, that the property thus conveyed should not be sold, until the estate of the sureties and indorsers intended to be secured, were levied on by executions on judgment obtained against them: *Held*, that the deed was not obnoxious to the objection of being made to "delay, hinder or defraud creditors." *Ib.*

DEEDS OF TRUST—(CONTINUED.)

14. A deed of assignment made by a debtor, to secure certain persons as his sureties is not void, because the condition is imposed that they shall have no remedy by sale, under its terms, until they have first paid the security debt. *Tarver* v. *Roffe*, 873.

15. Nor is such a deed void on account of an imperfect description of some of the chattels conveyed by it, though it may be doubtful how far a creditor will be affected by such a description, when he seeks to condemn the property imperfectly described. *Ib.*

16. Where a legal effect can be given to a deed, and property is not placed beyond the reach of a creditor, it is not void *per se*. *Ib.*

See Fraud, 9.

DEMURRER.

1. *Semble*—the plaintiff cannot object on general demurrer that a plea is argumentative, or that it amounts to the general issue; according to the English practice he should demur specially. *Rake's Adm'r* v. *Pope*, 162.

See Practice at Law, 4.

DEMURRER TO EVIDENCE.

1. *Quere*—If the defendant demurs to the evidence adduced by the plaintiff, and the jury notwithstanding return a verdict, and such judgment was rendered as would have been proper on the demurrer, is the failure to withdraw the cause from the jury available on error? *Carlisle* v *Davis*, 42.

2. Where the defendant pleads two pleas, each of which tolerates the admission of the same evidence, if a demurrer is improperly sustained to one, the judgment will not be reversed on error, because the error could not possibly work an injury. *Rake's Adm'r's.* v. *Pope*, 162.

DEPOSITIONS.

1. A party to a suit may be the bearer of a deposition taken at his own instance, from the commissioner to the clerk of the Court, where the cause is pending, and make the usual declaration that he delivered it in the same condition in which he received it. *Logan* v. *Hodge's adm'r*, 66.

2. An abortive attempt to take the deposition of a non-resident, in whose possession a deed was last known to be, is equivalent to a demand of the deed. *Beall* v. *Dearing*, 124.

3. It is no objection to a deposition that the interrogatories are prolix, multifarious, and double, but if the record is thereby unnecessarily encumbered, the offending party may be taxed with the costs thereby unnecessarily incurred. *Borland* v. *Walker and others*, 269.

4. An objection to an entire interrogatory, when part of it was proper, should be overruled. *Ib.*

5. The deposition of a witness should not be excluded, merely because he has omitted to answer one of the questions propounded, which was *prima facie* impertinent, and the direct answer to which could not benefit the party by whom it was proposed. *Gibson, et al.* v. *Goldthwaite*, 282.

6. Where the return of the commissioner states the deposition of a witness to have been taken by virtue of the commission, it is sufficient to authorize the reading of the deposition, although a certain place is named in the commission where the

DEPOSITIONS—(CONTINUED.)

witness is to be examined, and the return is silent as to place. In order to suppress the deposition, an affidavit is necessary that the party attended at the particular place. *Comstock, et al.* v. *Meek & Co.* 528.

7. Under the law authorizing the testimony of parties to the suit to be taken, the testimony of one living out of the State, may be taken, by a commission issuing by order of the Court. *Huggins* v. *Carter & Heathman*, 630.

8. Notice to the attorney of record is sufficient. *Ib.*

9. When, upon the taking of a deposition, a witness is examined in chief upon matter not admissible in evidence, the opposite party may conditionally cross-examine the witness upon the same subject, and if the examination in chief is rejected, the cross examination will share the same fate. The cross examination as to other matters would be admissible. *Olds* v. *Powell*, 652.

10. When a commission to take a deposition does not contain the time and place at which it is to be taken, but the commissioner sends enclosed with the deposition, a written notice, which does set forth the time and place, and which is attached to the deposition; if he certifies, that pursuant to, or by authority derived from, the enclosed commission, he took the deposition, it will be evidence *prima facie*, that the deposition was taken pursuant to the notice. *Ib.*

11. If there is reason to believe that one paper has been substituted for another, in a deposition, the proper motion is to suppress the deposition. *Carters* v. *Mannings & Jackson*, 851.

12. When the deposition of a witness is taken to prove the contents of a deed, it is not necessary to give notice to produce the deed, when the deposition is taken, but such notice must be given, before the deposition can be read upon the trial. *Hemphill* v. *Townsend*, 853.

13. Although a witness in answering an interrogatory, under the law authorizing parties to be examined, may state any thing which relates to the immediate subject, upon which he is called on to answer, and his response must be taken entire, or not at all, yet his answer to a distinct matter from that inquired of, is not evidence for him. *Lake* v. *Gilchrist*, 955.

See Evidence, 31.

See Practice in Chancery, 25, 26.

DETINUE.

1. Where detinue is brought for the recovery of several articles, it is not necessary that the value of each should be separately stated in the declaration, but *generally* the jury should sever the value of each by their verdict. *Haynes v. Crutchfield*, 189.

2. The omission of a purchaser of property at a public sale to take possession thereof, will not prevent him from maintaining *detinue* against the former owner: actual possession by the plaintiff, not being essential to the maintenance of the action. *Ib.*

3. In detinue for a cow and calf and fourteen hogs, it is not error, if the jury assess an aggregate sum as the value of the cow and calf, and another sum as the value of the hogs. *Ib.*

4. In an action of detinue for slaves, the omission to ascertain the value of each slave by the verdict of the jury, is an error affecting the judgment, although the defect of the verdict is in valuing a mother and children, or children of the same mother together. *Bell v. Pharr, et al.* 807.

DETINUE—(CONTINUED.)

5. There seems to be no reason why a recovery may not be had in an action of detinue, for a slave who dies pending the suit. *Ib.*
6. Actions of detinue involve the title to the chattel, at the commencement of the suit, and the writ is a sufficient demand. *Ib.*

See Amendment, 4.

See Pleading, 8.

DOWER.

1. One, not a party to a proceeding in the County Court upon a petition for the admeasurement of dower, cannot prosecute a writ of error to this Court, to reverse the judgment. *Earle* v. *Juzan*, 474.
2. A tenant in dower, in this State, has the right to change woodland into arable, if the proportion of woodland is such, that a prudent farmer would consider it best to reduce a portion of it to cultivation; and the general criterion by which to determine whether waste has been committed, is where lasting damage has been done to the inheritance, or its value depreciated. *Alexander, et al.* v. *Fisher*, 514.
3. Such a tenant, however, has not the right at pleasure, to cut down or otherwise injure the growing timber, although she is entitled to what is necessary for firewood, and for the repairs of buildings and fences, on the dower lands. *Ib.*
4. *Quere?*—If she has the right under any pretence to destroy groves of timber, or trees planted for shade or ornament—but when such are destroyed, Chancery will not decree compensation, in the absence of proof of value. *Ib.*

EVIDENCE.

1. *Semble*—Where the defendant denies by plea, regularly pleaded, that he made the note on which the action is founded, the plaintiff may read the note to the jury, if he show *prima facie* that it was made by the defendant, or that he authorized it, or adopted it as his own; but in the inquiry before the Court, the examination should not be extended so far as to show, that in point of law, there is no obligation upon the defendant. When the note has been read to the jury upon the plaintiff's proof, then the defendant may adduce his evidence. *Knapp* v. *McBride & Norman*, 19.
2. So where a note purports to have been made by an attorney, the written power, if unexceptionable in point of law, and shown by the plaintiff to be *prima facie* genuine, should be allowed to go to the jury, in an action upon the note. *Ib.*
3. Where an action is brought upon a promissory note, with an affidavit of its loss, if the plaintiff has it, at the trial it may be read to the jury. *Carlisle* v. *Davis*, 42.
4. A writing in the form of a promissory note for the payment of a sum of money, "in the common currency of Alabama," is not an undertaking to pay the sum expressed in coin, but in bank notes, which was the common currency of the State when the writing was made; consequently it is inadmissible under a declaration describing it as a promissory note for the payment of a sum *in numero*, and unassisted by other proof, it will not sustain a recovery upon the common counts in assumpsit. *Ib.*
5. It is competent for the vendor to prove knowledge in the vendee of a defect in the title when the contract was made, as an excuse for not making the title at the time stipulated. Such proof does not vary the contract of the parties, though it may excuse its literal performance. *Beck* v. *Simmons & Kornegay*, 71.

EVIDENCE—(CONTINUED.)

6. The certificate in the protest of a notary setting forth the demand and refusal of an inland bill, &c., and notice to the drawer and indorsers, is made evidence by statute, yet it is not conclusive; and it is competent for the party to shew such a state of facts, as prove that the certificate is untrue. *The Bank of Mobile* v. *Marston*, 108.

7. An abortive attempt to take the deposition of a non-resident, in whose possession a deed was last known to be, is equivalent to a demand of the deed. *Beall* v. *Dearing*, 124.

8. Where a deed is of ancient date, is of such a character as would not probably be preserved a great length of time, as a bill of sale of slaves, and no inference can arise that the party improperly withholds the deed, a slight showing of diligence will be sufficient to let in the secondary evidence. *Ib.*

9. A certified copy of a registered deed, which the law does not require to be recorded, though not evidence of the contents of the deed, was proper to go to the Court, in the case of a deed thirty years old, to show *prima facie*, that such a deed once existed; but before the jury, the party would have to prove the fact of the execution of the deed, as well as its contents. *Ib.*

10. The execution of a lost deed must be proved before secondary evidence can be given of its contents, but if it be thirty years old, its due execution may be presumed. *Ib.*

11. B. being sued upon a promissory note, pleaded *non assumpsit*, want of consideration, &c.; upon the trial of the cause he offered in evidence a bond executed by the payee, conditioned to make title to a tract of land, and proposed to show that the note was given for the payment of part of the purchase money, and, that although the condition of the bond did not recite its date truly, yet it was the same note, to which the condition referred: *Held*—that the bond should be permitted to go in evidence to the jury. *Bates* v. *Terrell*, 129.

12. *Quere?*—Where notice is given to a party to produce the certificate of the receiver of the land office, showing the purchase of a tract of land, and he produces a patent for the same land issued six years before the trial, will it be intended that the party has ceased to be the custodian of the certificate, so as not to authorize the admission of parol evidence of its contents. *Ib.*

13. In an action upon a promissory note, which has been transferred by delivery, if the nominal plaintiff die, the suit progresses in the name of the real plaintiff, who is liable for costs; and a distributee of the estate of the deceased is a competent witness for the plaintiff. *Ib.*

14. Where the defendant relies on the adjudication of the matters in controversy in a former suit as a bar to the action, he is not confined in his defence to proof by the record alone, but he may show by extrinsic proof what particular matters were litigated between the parties, provided the matters were within the issue tried in that suit. *Rake's Adm'r* v. *Pope*, 162.

15. The admissions of a party are not evidence either of the conveyance of land, in another State, or that by the law of that State, judgments are a lien on lands. The rule is, that admissions, out of Court, will not establish deeds, records, or statutes. *Morgan* v. *Patrick & Smith*, 185.

16. It is not error to permit to be read to the jury, a note in writing addressed by the plaintiff to the defendant, in detinue, before the commencement of the action, requiring the latter to deliver to the bearer the chattel, for the recovery of which

EVIDENCE—(CONTINUED.)

suit is brought;—such evidence may be unnecessary, but it could not prejudice the defendant. *Haynes* v. *Crutchfield*, 189.

17. The post mark on a letter is not evidence *per se* that the letter was deposited in the post office on the day indicated by the date of the post mark, yet its genuineness may be proved not only by the person who marks it, but by any person who is in the habit of receiving letters from that office. Upon such proof being made, it may be left to a jury to say whether the letter on which a post mark is, was not in the office where the mark purports to have been made, at the time of its date. *Crawford* v. *The Branch Bank at Mobile*, 205.

18. The question of personal identity is one solely for the jury, and oral evidence is competent to show that a plaintiff is the same person as the defendant's principal. *Chandler, &c.* v. *Shehan*, 251.

19. The retention of possession after an absolute sale of personal property, is evidence of fraud, though open to explanation, but is not sufficiently explained by proving a secret agreement between the vendor and vendee, that the latter should continue to control the property as the overseer of the former. *Borland* v. *Walker and others*, 270.

20. In an action of trespass for biting and bruising the plaintiff's finger, so that it became necessary to amputate it, it is not permissible to prove that the plaintiff was a man of drunken and dissipated habits, about and after the time of the alledged trespass; so as to lay a predicate for the jury to infer, whether the loss of the finger did not result from a condition of the system, superinduced by intemperance. *Wheat* v. *Lowe*, 311.

21. Where one is charged with the commission of a trespass upon a slave, in such a manner as to require a denial, or refutation, which the party accused refuses to do, but requires proof of the fact, it is in law an admission of the truth of the charge. *Wheat* v. *Croom*, 349.

22. General reputation is inadmissable to prove the fact of agency. *Blevins* v. *Pope & Son*, 371.

23. It is in the discretion of the primary Court to permit, or refuse, a leading question to be put by a party to his own witness, and cannot be revised on error. *Ib.*

24. Where the action, as in trover, for the conversion of a note, charges the defendant with the possession of the instrument, the rule as it regards the preliminary proof, previous to giving secondary evidence of the contents, does not apply. Nor does it vary the case, that it comes out in proof, that the note is not then in possession of the defendant, but is in the possession of the maker; in the absence of proof to the contrary, it will be presumed that he placed it there, and that it is still under his control. *Ib.*

25. Where the fair inference from the proof offered is, that its only effect, (if any,) was to show that a transaction between the parties, disconnected with that before the Court, was fraudulent, it should not be permitted to go to the jury. It is not permissible to give evidence of one fraud, that it may be inferred that the party was guilty of another, with which he is charged. *Johnston* v. *The Branch Bank at Montgomery*, 379.

26. In an action against the purchaser of lands at a sale under execution, the execution was produced, on which was indorsed the levy and sale; a witness was then introduced who testified that he acted as the deputy of the plaintiff on the day of sale, that he made a memorandum on a slip of paper, which described the land correctly, and the defendant as the purchaser for the sum of two hundred

EVIDENCE—(CONTINUED.)

and thirty-seven dollars: *Held*, that the fair inference both of reason and law, was, that the witness was acting as deputy *at the sale of the land, and then, or immediately thereafter*, made the *memorandum*. If the fact was otherwise, the defendant by a single inquiry could have elicited the truth from the witness, and cannot now be heard to alledge that the inference from his evidence is false. *Simpson* v. *Pettus*, 453.

27. Evidence which is relevant to the issue, cannot be rejected by the Court, because, unless assisted by other proof, it will not establish the point in dispute. If *prima facie* irrelevant, it may be rejected by the Court, unless the party offering it states its connection with other facts showing its relevancy. *Cuthbert* v. *Newell*, 457.

28. Evidence, that eighteen months before the suit, the plaintiff received from the defendant, accounts and claims to a much larger amount than the note sued on, for the purpose of collecting them, and paying the debt, relevant, because it was the initiatory step towards proving a payment. *Ib.*

29. Where a slave sold by a constable is afterwards levied on by another creditor, and claimed by the purchaser, an amended return made by the constable during the trial of the claim, may be read as evidence, it being good so far as it goes. *Savage* v. *Forward*, 463.

30. A voluntary bankrupt is not a competent witness for the assignee in bankruptcy, to establish a debt due the bankrupt. *Cromwell & Johnson, Adm'rs.* v. *Comegys*, 498.

31. One co-legatee cannot make herself a competent witness to increase the distributive sum of her co-legatees, by releasing to them her interest in the legacy; and her deposition under such circumstances may be properly suppressed. *Powell, et al.* v. *Powell, Adm'x*, 582.

32. A writing acknowledging the receipt of money of the plaintiff, and promising to pay it to him presently, cannot be varied by parol proof, showing that it was to be paid into a Bank, some twenty or thirty miles from the plaintiff's residence. But if the defendant has paid the money into Bank by plaintiff's direction, he might have shown it in his defence; or if he had promised thus to pay it after the note was made, and failed, *perhaps* the plaintiff might show such promise as an excuse for the failure to sue within six years. *Owen* v. *Henderson*, 641.

33. When parties make a settlement of their accounts, and reduce it to writing, the written instrument is the highest evidence of the fact. *Walker* v. *Driver*, 679.

34. When a settlement of accounts is made and reduced to writing upon the back of another instrument, to which the settlement refers, such reference authorizes the party against whom the settlement is read, to read such instrument, to control or explain it. Proof of the execution of the instrument, is not necessary to authorize the introduction of the settlement in evidence. *Ib.*

35. When upon the settlement of an account, one of the parties admits certain judgments, which the other had obtained against a third person to be included as a charge against him, such person may be called to prove that no such judgments existed, but he cannot impeach their correctness, by proving that the debt on which they were founded was unjust, or never had an existence. *Ib.* 680.

36. A settlement made and balance struck, is *prima facie* binding, until impeached for mistake or fraud, which the party alledging must prove. *Ib.*

37. It is competent for a party relying on a stated account, to introduce the person who made it, to prove, that it was made upon items admitted by the parties. *Ib.*

EVIDENCE—(CONTINUED.)

38. In order to let in evidence to show that a promissory note, the foundation of the action, has been paid, or that its consideration has failed, it is not necessary to identify the note by the positive declaration of a witness: its identity may be determined by the jury, from the description given of it, and other circumstances. *Smith* v. *Armistead's Ex'rs*, 698.

39. Where testimony is offered which is admissible in itself, though insufficient to warrant the jury in finding a verdict, the Court cannot assume that the party has no further proof to advance, and reject the evidence. *Ib.*

40. The register in which a deed is recorded pursuant to statute, is but a copy, and cannot be read as evidence of its contents, without first accounting for the absence of the original. *Ib.*

41. Although the matter to which a writing relates may be proved entirely independent of it, yet if its contents are inquired after, it must be produced, or its absence excused. *Ib.*

42. *Quere?*—Is it competent to give parol evidence of the contents of papers, where they do not form the foundation of the cause, but merely relate to some collateral fact? *Ib.* 699.

43. Secondary evidence of the contents of a deed is not admissible, merely because the person offering it is not a party to the deed; if the paper is in the hands of a third person, under such circumstances that the law will not compel him to produce it, then secondary evidence is admissible; but if he who has the custody of it, is within the reach of the Court, *ordinarily*, a *subpœna duces tecum*, would be proper to coerce its production. *Ib.*

44. Reputation is not admissible evidence to prove insolvency, as that is the legal conclusion from facts to be stated; but reputation of facts or circumstances from which insolvency may be inferred, is proper evidence to go to the jury. *Lawson* v. *Orear*, 784.

45. Proof of the admissions of the plaintiff, that he had paid nothing on account of his suretyship, and did not know whether any thing was due or not, upon the note on which he was surety, does not prove that he cannot be damnified by his suretyship, and that therefore the indemnity is *functus officii*. *Laroque* v. *Hatch & Russell*, 798.

46. Proof relevant to the issue cannot be excluded by the Court. *Ib.*

47. The identity, and value of slaves, are questions solely for the jury, and any evidence bearing on these points is proper. *Bell* v. *Pharr, et al.* 807.

48. Where receipts have been given by agents, they may be called as witnesses, and it admits of question if proof of their hand writing can be given; but such evidence is clearly not proper, without showing the receipts were in existence, or signed at the time when the authority continued. *Ib.*

49. Where it appears from a bill of exceptions that a surety who was sued, released his principal, offered him as a witness, and he was rejected by the Court, upon the ground of incompetency, it will not be presumed, in order to sustain the judgment, that it was proposed to elicit from the witness facts, in themselves inadmissible. *Bondurant, et al.* v. *The Bank of the State of Alabama*, 831.

50. A party as agent of one of several defendants against whom the sheriff held an execution, agreed with the sheriff to pay him at a future day, so much as he required of his principal, and made the payment accordingly: *Held*, that what the sheriff said at the time of his negotiation with the agent, was admissible as a part of the *res gestæ*. *Ib.*

EVIDENCE—(CONTINUED.)

51. The copy of a receipt for money, is not in itself, such evidence as should be permitted to go to the jury, yet it is allowable for a witness to inspect it, and if he can, then testify to the facts it discloses from his own recollection; but if he neither recollects the facts, nor remembers to have recognized the writing as true, while the facts were fresh in his memory, then the paper is nothing more than hearsay, and is incompetent evidence. *Ib.*

52. The proof was, that the defendant had charged the plaintiff with swearing to a lie, before one H., a justice of the peace, of B., in a cause pending before that justice, in which the present defendant was plaintiff, and A. S. defendant; in the declaration the names of the parties to the suit were transposed: *Held*, if the declaration referred to, and was intended to indicate the case which the witness had in view, the variance between the allegation and proof was not fatal. *Teague* v. *Williams*, 844.

53. Where the declaration charges the speaking of many slanderous words, it is competent for the plaintiff to prove that the defendant spoke some of the words charged, more than twelve months before suit brought, whether actionable in themselves or not, for the purpose *only*, of showing *quo animo* the slanderous words proved to have been spoken within the twelve months, were uttered; and this although the statute of limitations is pleaded. *Ib.*

54. Where the Court rejects evidence of defamatory words, offered by the plaintiff, the defendant should not be allowed to adduce proof, that the words thus rejected were true. *Ib.*

55. The length of notice to produce a paper in evidence, depends upon the circumstances of the case; but if the paper is in possession of the party, in Court, one day's notice, or a much shorter time, would be sufficient. *Hemphill* v. *Townsend*, 853.

56. When the deposition of a witness is taken to prove the contents of a deed, it is not necessary to give notice to produce the deed, when the deposition is taken, but such notice must be given, before the deposition can be read upon the trial *Ib.*

57. The wife of the defendant in execution, is a competent witness for the claimant upon a trial of right of property. *Ib.*

See Bills of Exchange and Promissory Notes, 8, 10,
See Consideration, 3.
See Depositions, 1, 13.
See Executions, Writ of, 9.
See Gift, 1, 2.
See Limitations and Non-claim, Statute of, 7.
See Pleadings, 7.
See Principal and Surety, 3.
See Slander, 1, 2, 3.
See Vendor and Vendee, 8.
See Witness, 2, 3.

EJECTMENT, AND TRESPASS TO TRY TITLES.

1. In an action of ejectment, a conveyance by the lessor of the plaintiff, of all his right, title and interest, to the land in dispute, made to the defendant, pending the action, may be pleaded *puis darrein continuance. Doe, ex dem. Alexander v. Collins, et als.* 480.

2. Whether in such a case a technical release can be pleaded—*Quere? Ib.*

3. Evidence being given of a former possession of land by a defendant in execution, accompanied by acts of ownership; and proper evidence being shown of the sale and conveyance of all his right, under a sale by the marshal of the United States, by virtue of a judgment and execution, it is not an assumption of a fact for the Court to charge the jury, that his possession and improvements vested in him such a legal title, as to enable him to maintain ejectment against one ousting him. *Badger v. Lyon*, 564.

4. A prior possession, accompanied by acts indicating ownership of land, by a defendant in execution, will authorize a recovery, by one having his right under a conveyance from the marshal of the United States, against one found afterwards in possession of the same land, but showing no title. *Ib.*

5. A mere trespass by entry upon another's right, does not make an adverse possession; to constitute which, a claim, or color of title, is necessary. *Ib.*

6. An admission that the damages for the mesne profits shall be entered at a certain sum, if the plaintiff is entitled to a judgment, dispenses with proof that the defendant was in possession at the time of suit. *Samuels v. Findley*, 635.

ELECTION.

1. The plaintiff's execution was levied by the sheriff and a claim of property interposed by a third person, and bond with surety given to try the right, pursuant to the statute; the plaintiffs moved to dismiss the claim, which being overruled, a judgment for costs was rendered against them, and a writ of error prosecuted to vacate the same; the judgment was reversed and the cause remanded, then on motion of the plaintiffs, the claim was dismissed: *Held*, that these proceedings did not amount to a waiver, (upon the ground of election or otherwise,) of the summary remedy against the sheriff for neglect in failing to make the money on the execution. *Leavitt, et al. v. Smith, et al.* 175.

See Chancery, 30, 32.

ELECTIONS BY THE PEOPLE.

1. When an election is ordered by the Legislature to ascertain the sense of the people of the county, as to the site of the court house, and an election is had, it ought not to be disturbed because of same irregularity, or informality in the mode of holding it, if a majority of the legal votes are cast in favor of a particular place. *Clifton, et al. v. Cook*, 114.

2. The sheriffs elected under the act of the 12th January, 1833, "for the organization of certain counties therein named," were entitled to their offices for the constitutional term of three years, although their successors may have been elected, at the general election in August preceding the expiration of that period. And the successors may continue in office for three years, calculating from the time that the term of their predecessors expire; unless they entered upon the discharge of their official duties sooner, which it seems they might do at any time after their election, and in virtue thereof. *The State ex rel. Easley* v. *Spence*, 500.

ERROR, WRIT OF.

1. The judgment of the Judge of the County Court upon the probate of a will, and his decree of final settlement of the estate under the will, cannot be joined in the same writ of error. *Boyett, et al. v. Kerr*, 9.
2. The judgment upon the probate of a will cannot be reviewed by a writ of error after the lapse of three years, between the judgment and the suing of the writ of error. *Ib.*
3. A party excepting to the ruling of the Court against him must show affirmatively the existence of error, and an appellate Court cannot aid him by presuming what the record does not discover. *Knapp v. McBride & Norman*, 20.
4. Where the defendant pleads two pleas, each of which tolerates the admission of the same evidence, if a demurrer is improperly sustained to one, the judgment will not be reversed on error, because the error could not possibly work an injury. *Rake's Adm'r v. Pope*, 162.
5. After verdict and judgment, it is not competent for a party to object on error, that the notice by which he was brought into Court, or the orders of continuance previous to trial, were irregular. *Bancroft, Adm'r, &c.* v. *Stanton*, 351.
6. A writ of error sued out in a Chancery case in the names of the parties to the original bill, where new ones are made by a supplemental bill, is irregular; but under the statute the writ is amendable by the record. *Toulmin, et al.* v. *Hamilton, et al.* 362.
7. After the plaintiff has taken issue informally upon a plea of the insolvency of the estate of which the defendants are sued as administrators, and which plea is conceded to be substantially good, it is error if the judgment entry recites that it was overruled by the Court. *McVay's Adm'rs v. Krebs*, 456.
8. One, not a party to a proceeding in the County Court upon a petition for the admeasurement of dower, cannot prosecute a writ of error to this Court, to reverse the judgment. *Earle v. Juzan*, 474.
9. It seems that the proper remedy for one aggrieved by the judgment of the County Conrt, in such case, is to remove it by *certiorari* into the Circuit Court. *Ib.*
10. A writ of error cannot be sued out upon directions to the master as to the effect of certain allegations and exhibits in the answer, where the reference does not finally dispose of the cause. *Powell, et al.* v. *Powell, Adm'rx*, 582.
11. A memorandum made by the defendant after the adjournment of the Court, upon the papers of a cause which had been dismissed, consenting to reinstate it, cannot be regarded as a part of the record, and will not bar a writ of error, or prevent the revising Court from correcting the erroneous dismissal. *Britt v. Burk*, 588.
12. When the plaintiff asks and obtains leave to be *nonsuit*, he will not be heard to assign error upon the exclusion of evidence. *Mahony* v. *Chandler*, 732.
13. An order of the Orphans' Court requiring the shares of several distributees, in the slaves of an intestate's estate to be set apart and allotted to them pursuant to their petition—appointing commissioners to make distribution accordingly—and directing *further*, that the administrator should produce the slaves required by the commissioners, and afford all necessary facilities for making the division, is such a final order within the statute, as may be revised by writ of error. *Harrison, et al. Ex parte*, 736.
14. The refusal of a Court to permit a party to file interrogatories, and make an order for the adverse party to answer the same is not reversable by writ of error.

ERROR, WRIT OF—(CONTINUED.)

Quere?—Whether a mandamus is not the proper remedy, when a proper case is made. *Mallory, et al.* v. *Matlock*, 757.

15. A party complaining of error must show sufficient matter in his bill of exceptions to create the presumption of injury, as well as of error, and this is shown whenever the evidence admitted against an exception is *prima facie* irrelevant, or illegal. *Lawson* v. *Orear*, 784.

16. Objections of form, cannot be made to the declaration, on error, after verdict. *Allen* v. *Claunch*, 788.

17. An allegation in the declaration, that the note was delivered to the defendant, is a clerical misprision, amended by other parts of the record, and therefore not available on error. *Ib.*

18. The submission of a cause to a jury, after judgment by default, is a mere irregularity, not available on error. *Ib.*

19. The provision in the act of 1843, authorizing a writ of error, by, or against a single creditor, applies only before the final settlement of the estate; after final settlement, a writ of error must be prosecuted in the name of, or against all, the creditors. *Martin, Adm'r* v. *Baldwin*, 923.

See Amendment, 3.
See Appeals and Certiorari, 3.
See Chancery Practice, 18, 20.
See Deeds and Bonds, 1.
See Demurrer to Evidence, 1.
See Intendments and Legal Presumptions, 1.
See Practice at Law, 12.

EXCEPTIONS, BILL OF.

See Executions, Writ of, 10.
See Error, Writ of, 15.

EXECUTIONS, WRIT OF.

1. Although goods are levied on by a junior execution, and delivered to a third person, who has interposed a claim and given bond with surety as required by law, yet it will be competent to levy on the same by a *fieri facias*, the lien of which first commenced and still continues. But if the older execution is first levied and proceedings instituted to try a claim, a junior execution cannot be levied on the same property. *Langdon & Co.* v. *Brumby, Adm'r*, 53.

2. In a controversy between a purchaser at an execution sale, made upon the original judgment after its affirmance in the Supreme Court on a writ or error, superseded by bond and surety, and one claiming by a conveyance from the defendant in execution, executed pending the cause in the Supreme Court, the title of the latter will prevail. *Brock & Youngue* v. *Youngue*, 64.

3. Whether the rule would not be different if the contest was between the defendant in execution and a purchaser at such sale.—*Quere. Ib.*

4. Not only a perfect, but an inchoate legal title to lands, may be levied on and sold under a *fieri facias*. *Land* v. *Hopkins*, 115.

EXECUTIONS, WRIT OF—(CONTINUED.)

5. The defendant in execution was in possession of a lot under a deed executed on the 1st of April, 1837, by J. C. M., as treasurer of the commi sioners appointed to sell lots in the town of Livingston, with covenant of warranty; in December, 1838, the defendant in execution bargained and sold the lot, to a third person, to whom he delivered the possession. In June, 1838, the plaintiff obtained his judgment—on the 5th of August, 1839, the lot in question was sold under a *fieri facias* issued thereon, and in October, 1840, a patent was issued by the United States to the commissioners, &c., for the tract of land of which the lot was a part: *Held* that the judgment operated a lien upon the lot before the sale by the defendant in execution, and that the vendee of the latter might be dispossessed by action at the suit of the purchaser at the sheriff's sale. *Ib.*

6. Where a levy is made on slaves and bond given to try the right by one claiming them, a subsequent junior execution cannot be levied on the same slaves, although they are left by the claimant with the defendant in execution. *Kemp & Buckey* v. *Porter*, 138.

7. Where the principal executes a mortgage for the indemnity of his surety, and a judgment is afterwards rendered against the principal and surety for the debt intended to be secured, but before such judgment is obtained, other judgments are rendered and executions issued, so as to create a lien upon the principal's property, the surety cannot in virtue of the lien of his mortgage, give a preference to an execution of the plaintiff in the judgment against himself and principal; but if he would make his security available he must proceed under the mortgage. *Stover* v. *Herrington, et al.* 142.

8. The settlement of an account by the defendant in execution with the sheriff, for money due from him, is no discharge of the execution, although the sheriff receipts for the amount of the account as money. *Williams* v. *Charles*, 202.

9. Where a constable has sold slaves under a levy made by him, there being at the same time an older levy by the sheriff a subsequent creditor levying on the slave, after the sale, cannot raise the question, as to the right of the constable, under the circumstances to levy. *Savage* v. *Forward*, 463.

10. Where a creditor makes an affidavit to procure the immediate issuance of an execution, his motive is not *prima facie* a subject of inquiry, though under certain circumstances, as for instance, a case of fraudulent combination to defraud creditors, this inquiry may be made; yet it is necessary to set out these circumstances in the bill of exceptions, before an appellate Court can judge whether the motive could be inquired into. *Ib.*

11. The sheriff is not authorized to pay the money due on a judgment, and keep the execution open for his own benefit. But, *quere*, if the defendant avail himself of the payment, by moving to quash the execution, is not a previous request to pay, or a subsequent adoption of the act, the necessary inference. *Rutland's Adm'r* v. *Pippin and another*, 469.

12. An execution issued by a justice of the peace, which does not prescribe when it shall be returned, otherwise than by a command to make due return of it to the justice, is at most irregular merely, and affords no excuse against a motion for not returning it within the longest period, to which the discretion of the justice to make it returnable extends. *Wofford* v. *Robinson*, 489.

13. A *fieri facias* operates a lien upon the goods and chattels of the defendant, that are within the county to which it issues, and the lien will not be lost by their re-

EXECUTIONS, WRIT OF—(CONTINUED.)

moval to a different county, if another *fieri facias* is regularly issued as provided by the act of 1828. *Hill* v. *Slaughter*, 632.

14. Where the lien of a *fieri facias* is suspended, by the removal of the property from the county to which it issues to another; in order to revive it, the plaintiff should cause a *fieri facias* to be issued to the latter county; the transfer of the execution from the sheriff of the former to the sheriff of the latter, with a notice of the lien, cannot have the effect to continue or revive it. *Ib.*

15. A writ of *venditioni exponas*, which contains no *fieri facias* clause, does not invest the sheriff with authority to sell other property than is named, or to create or to continue a lien. *Quinn, et al.* v. *Wiswall*, 645.

16. The sale under a junior judgment which is not a lien upon the lands sold, cannot be sustained by referring the sale to the authority given by an older execution, and judgment, when the older execution was not in the sheriff's hands at the time of the sale. *Ib.*

17. It is no sufficient return to a *Ca. Sa.* that the defendant therein, after it was placed in the officer's hands, applied for the benefit of the bankrupt act of 1841; and this, although he afterwards obtained a final discharge in due course of proceedings; for *non constat* at the time the execution was returned, that the suit in bankruptcy would be successfully prosecuted. *Robb* v. *Powers et al*, 658.

18. Where a sole judgment debtor dies before the issuance of any execution, and afterwards a *Fi. Fa.* is issued, it is wholly void, and a sheriff in whose hands it is placed is not liable to a rule for not returning it. *Holloway, et al.* v. *Johnson*, 660.

19. When a wife by deed of marriage settlement, has property secured to her separate use, through the medium of a trustee, and among such property are several mules, which were on a farm occupied by the husband, at the time of the levy by the sheriff upon a horse belonging to the husband, such horse is not exempt from execution, under the statute permitting every family to retain certain articles. *Simonds* v. *Gulley*, 721.

20. Notice given at the time of a sheriff's sale of an unextinguished equity, is sufficient to charge a purchaser, and in this respect there is no distinction between sheriff's and other sales. [ORMOND, J. delivering opinion of the majority of the Court.] *Williamson* v. *Branch Bank at Mobile*, 907.

See Bankrupt, 4.

See Chancery, 32.

See Husband and Wife, 5.

See Judgment and Decree, 2.

See Sheriff and Sureties, 3, 4, 7, 9, 10.

See Trust and Trustee, 10.

EXECUTORS AND ADMINISTRATORS.

1. The proper test to ascertain whether plaintiffs suing as executors are liable for costs *de bonis testatoris*, is, that the money sued for, if recovered, will be assets of the estate. *Chandler, et al. Ex'rx. and Ex'rs, of Chandler, dec'd.* v. *Shehan*, 251.

2. One joint executor may lawfully take a note with surety from his co-executor for the purchase money of estate sold by them jointly as executors. *Hampton* v. *Shehan*, 295.

EXECUTORS AND ADMINISTRATORS—(CONTINUED.)

3. An administrator, when cited to a final settlement by a distributee, is entitled to show a retainer of assets for any just debt due to himself, although within the bar of the statute of limitations, so that it is without the period of time when the presumption of payment would arise. *Distributees of Knight* v. *Godbolt, Adm'r*, 304.

4. A judgment was rendered against the appellant, (who was administrator,) *de bonis intestatis;* at a subsequent term a judgment was rendered against his surety for the appeal, and execution directed against both: *Held*, that the entries only authorized one execution, *de bonis intestatis* as to the principal, and *de bonis propriis, &c.* as to the surety; that if the judgment as to the surety was erroneous, the error was at most a mere clerical misprision, amendable in this Court, under the statute, at the cost of the plaintiffs in error. *Bancroft, Adm'r.* v. *Stanton* 351.

5. As a general rule, it is not allowable to join in the same action an administrator with one chargeable on his own account, but this rule has never been applied so as to prevent the rendition of a judgment under the statute, against an appellant and his surety, though the former was an executor or administrator. *Ib.*

6. Where an administrator who is made a defendant, *pendente lite*, does not claim a continuance, but goes to trial, and a verdict and judgment are rendered against him, he cannot object on error, that the cause was tried within six months after the grant of administration. *Ib.*

7. An administrator causes an execution to be issued upon a judgment obtained by his intestate, and to be levied on a slave which is claimed by a third person, and a trial of the right of property is had under the statute, which results in the condemnation of the slave, who is sold, and the money received by the administrator. Afterwards, the judgment of condemnation is reversed, and upon another trial the slave is found not liable to the satisfaction of the execution: *Held*, that the administrator was liable in an action of assumpsit, in his individual, and not in his representative character, for the money so received. *Burdine* v. *Roper, Adm'r*, 466.

8. When an administrator is removed from office, he cannot regularly sue out execution in his own name upon a judgment recovered by him as administrator. *Salter* v. *Cain*, 478.

9. If an administrator, after removal from the administration, collects money recovered by him as administrator, it is money had and received to the use of the administrator *de bonis non*, who may sue the former administrator in assumpsit. *Ib.*

10. In an action of assumpsit against an administrator *de bonis non*, an offer by the administrator in chief to pay the principal sum sued for, in notes of third persons, is proper evidence to be left to the jury; the question upon such proof is, whether by this offer, the party was to be understood as admitting the debt sued for, to be then a valid and subsisting debt, which he was liable and willing to pay; or whether the offer to pay in notes was intended as a qualification of his liability, and as the condition upon which alone he was willing to pay. *Newhouse & Co.* v. *Adm'r. of Goodwin*, 598.

11. The sureties of an administrator, who has left the State, may appear and represent him on the final settlement, and will be entitled to reduce the decree, by the value of his services rendered as administrator. *Carroll* v. *Moore, Adm'r*, 615.

12. No question can arise in this Court, as to the reasonableness of the compensation, unless made in the Orphans' Court. *Ib.*

EXECUTORS AND ADMINISTRATORS—(CONTINUED.)

13. An administrator, who has paid any of the distributees, may on proof of the fact, have satisfaction entered *Ib.*
14. The Orphans' Court cannot decree, that the sureties, on satisfying the decree rendered, be discharged from further liability—that can only be ascertained, by a proceeding upon the bond itself, before a competent tribunal. *Ib.*
15. Where an executor qualifies in Virginia, and there under the will takes possession of slaves, charged with a legacy, which he afterwards removes to this State, and there is no evidence of what are the laws of Virginia, the common law must be looked to, in order to ascertain the nature of the executor's title, and whether a purchaser from the executor can resist the claim of the legatee, to charge the slaves with her legacy. *Williamson* v. *Branch Bank at Mobile*, 906.
16. When property is received by a foreign executor abroad, and it is afterwards remitted here, an administrator appointed here, cannot assert a claim to it here, against the person in whose hands it may be, or against the foreign executor. *Ib.*
17. A foreign executor, &c., is chargeable in this State for all the assets which he retains in his hands, or which he has disposed of, out of the course of his administration; and the legatee has the right here, to pursue the assets of the estate, so long as they continue to be held by the executor, or his personal representative. *Ib.*
18. Although an executor is invested with the absolute power to dispose of the personal estate of his testator, yet he can make no valid sale or pledge of the assets as a security for, or in payment of his own debt. *Ib.*
19. As between the executor and his immediate creditor, assets of the testator, may be seized and sold under execution, whenever there has been a devastavit; and when the executor has so dealt with the assets, as to be responsible for a devastavit, or has used them in a manner inconsistent with his trust, he cannot prevent his creditor from seizing them under an execution. *Ib.*

See Attachment, 6, 8.
See Legacy and Distributive Share, 3.
See Orphans' Court, 14.
See Pleadings, 17, 21.
See Set Off, 5.
See Trust and Trustee, 11.
See Will, and Probate of, 3.

FERRIES AND BRIDGES.

1. A license to establish a ferry is the grant of an incorporeal hereditament, subject to be revoked if a sufficient bond is not executed within ten days after such requisition is made. It is an interest which may be sold, and will descend to the heir as an incident of the fee. *Lewis, et al.* v. *Intendant and Town Council of Gainesville*, 85.

FIXTURES.

1. A cotton gin is not a fixture to the freehold, and therefore will not pass by a grant of lands, on which the gin house is located, to a trustee, for the purpose of being sold to pay the debts of the grantor. Notwithstanding such a grant, the cotton gin remains the property of the grantor, and may be taken by virtue of an exetion against him. *Hancock* v. *Jordan*, 448.

FORTHCOMING BONDS.

1. A forthcoming bond must describe the execution which is thereby superseded with sufficient certainty to enable the Court to determine what execution it was intended to supersede, but a small and unimportant variance will be disregarded. *Anderson* v. *Rhea*, 104.
2. Where a forthcoming bond corresponds with the execution in all respects, except that the *cents* in the judgment are omitted, the variance will not affect the bond. *Ib.*
3. The requisition of the statute that the bond shall be taken in double the amount of the execution, and that the property shall be delivered at twelve o'clock, noon, are merely directory. *Ib.*
4. A variance between the property described in the bond as having been levied on, and the indorsement of the levy on the execution, cannot be taken advantage of by the defendant. *Ib.*
5. The return of a sheriff that the bond is forfeited, may be impeached by proving that the defendant was ready on the day, and at the place named in the bond, to deliver the property. The appropriate mode of doing this is, by superseding the execution which issued on the forfeited bond. *Ib.*
6. A discharge of the levy as to part of the property, by the execution of a bond for the trial of the right, after the execution of a forthcoming bond, will not dispense with an offer to deliver the residue of the property. *Ib.*
7. A judgment rendered against Elihu Moffitt, and John V. B. Watson, will not sustain a forthcoming bond, which recites a judgment against Elihu Moffitt, and an execution issued upon such a bond, will be quashed. *Moffitt & Watson* v. *Branch Bank of Mobile*, 593.

FRAUD.

1. No inference of fraud arises upon a deed of trust, conveying property for a debtor as an indemnity to his sureties, from the circumstance that the property is to remain in the trustee's possession, until he may choose to sell, or be required to do so, by the beneficiaries of the deed. *Dubose* v. *Dubose*, 235.
2. Any execution creditor, independent of the statute right of payment, may compel creditors secured by mortgage or deed of trust, to close the trust by sale, and distribute the surplus, if any will be the probable result of a sale; and, without such probability, upon indemnifying the other party against the costs of suit and sale. *Ib.*
3. A direction in a deed of trust, which does not appear to have been made by an insolvent debtor, or one in failing circumstances, that the land conveyed by him shall, until its sale under the trust, be cultivated by the slaves conveyed, and such others as the trustee may procure, does not make the deed fraudulent as against a creditor subsequently suing out execution. *Ib.*
4. When one in an insolvent condition, with judgments then in force against him, and others about to be obtained, sells to his father-in-law his entire estate, not reserving his household furniture—providing by the contract for the payment of only a portion of his debts, and giving a credit for the residue of the purchase money, the first payment of which was to fall due in seven and the last in about twelve years—as its necessary tendency is to hinder, and delay creditors, the law will presume such to have been the intention of the parties, unless the suspicious appearances are satisfactorily explained, and the contract shown to be *bona fide*. *Borland* v. *Walker and others*, 269.

FRAUD—(CONTINUED.)

5. If in such a case the vendee long before the payments are due by his contract with the vendor, commences paying the unsecured creditors of the latter, they giving indulgence, it is evident that the contract was not real, and that there was a secret trust between the parties. *Ib.* 270.

6. The retention of possession after an absolute sale of personal property, is evidence of fraud, though open to explanation, but is not sufficiently explained by proving a secret agreement between the vendor and vendee, that the latter should continue to control the property as the overseer of the former. *Ib.*

7. Where one charged as a *particeps fraudis*, is examined as a witness to prove the contract fair, he can expect credence to be given to his statements only by making a full and frank disclosure of all the facts. If he answer generally, or evasively, the Court will be authorized to infer that the imputation against him is well founded. *Ib.*

8. When a contract is void for fraud, it is void *ab initio*, and will not be allowed to stand as security to the grantee for advances he may have made, or responsibilities he may have incurred. *Ib.*

9. In a bill to set aside and avoid conveyances of land, slaves, &c., upon an allegation of fraud, it appeared that the grantors were in debt, and believed to be insolvent at the time the deeds bear date; each of the grantors conveyed his entire visible estate; the one to his father-in-law, the other to his brother in-law; the one on the payment of the purchase money in ten annual instalments, the other on payments to be made at different periods, the last of which was twelve years after the sale; in the one case the use of the lands and the employment of the slaves, would enable the purchaser to pay the stipulated price in six or eight years, in the other in eight or ten years. The father-in-law said his object in making the purchase was to save the property, and he thought he could make it pay for itself on the credit obtained. After the sale, the son-in-law acted professedly as the overseer of his vendee. Since the sale by the brother-in-law he has exercised a control over blacksmiths and shop, over wagons and teams employed in hauling wood from the plantation for sale, all of which are embraced by his conveyance; but the vendee has employed overseers on the plantation. In respect to both it may be said, that the vendees have shipped the cotton crops growed on the respective plantations to market. The witnesses know of no change of property from either of the vendors; they each live where they did at the time of their sales, have their carriages, house servants, &c.—and live in the neighborhood of each other: *Held*, that both conveyances were made "to delay, hinder or defraud" the creditors of the respective vendors and must be set aside. *P. & M. Bank* v. *Walker, et al.* 927.

See Debtor and Creditor, 1.
See Deeds of Trust, 6, 7, 9, 10, 13, 14, 16.
See Trust and Trustee, 2, 4.
See Vendor and Vendee, 10,

FRAUDS, STATUTE OF.

1. A father sells a tract of land, the title to which is in the name of his son; the son, after some conversation, aside, with his father, makes a conveyance to the

FRAUDS, STATUTE OF—(CONTINUED.)

purchaser, who executes notes to the father for the price agreed on. The son, after these notes are paid, sues his father's administrator to recover the sum thus received for the tract of land so sold and conveyed: *Held*, that this was not a contract or agreement for the sale of lands within the statute of frauds. *Woodward, Adm'r* v. *Smith*, 112.

2. That provision of the statute of frauds, which declares that a defendant shall not be charged "upon any agreement which is not to be performed within the space of one year from the making thereof;" unless the promise or agreement, or some memorandum or note thereof, shall be in writing, signed, &c., does not apply to a contract wholly executed on one side, and where nothing remains to be done on the other, but to pay the money stipulated as an equivalent; and this although by the agreement, the money was not to be paid until after the expiration of the year. *Rake's Adm'r* v. *Pope*, 161.

3. When notes are given by a purchaser for the price of land, agreed to be sold by verbal contract only, their payment cannot be avoided, on the ground that the contract is void by the statute of frauds. It is an executed contract so far as the purchaser is concerned, and if the vendor is willing and able to perform the verbal contract, the notes cannot be for this cause avoided. *Rhodes' Adm'rs* v. *Storr* 346.

4. When a slave remains in the possession of a person other than the owner, for more than three consecutive years, under a contract for hire, made publicly or privately, the case does not come within the second section of the statute frauds, so as to subject the slave to the payment of the debts of the person in possession. *Johnston* v. *Branch Bank at Montgomery*, 379.

5. The levy of an attachment on a slave to pay the debt of a person to whom she was hired, the interposition of a claim of property, and the execution of a bond pursuant to the statute, interrupts the continuity of the hirer's possession, and again restores the slave to the owner. And thus precludes the creditors from deriving any benefit from the previous possession of the hirer, (which was short of three years,) if it were possible for such possession, when added to that subsequently acquired, to avail anything. *Ib.*

GAMING.

1. Where one, previous to the passage of the Penal Code, lost a horse by a bet upon a horse race, delivered the horse to the winner, and afterwards repurchased him, executing his note for the price, he cannot when sued upon the note, defeat the action, by proving the illegality of the original consideration, by which the plaintiff acquired the horse. *Windham* v. *Childress & Skanes*, 357.

2. Whether the provision of the Penal Code, extends to money, or property, lost upon a horse race—*Quere?* *Ib.* 358.

3. When a note made upon a gaming consideration, is transferred in payment of a debt, an action may be maintained upon the consideration of the original debt, without proof of any diligence to recover the amount of the note from the maker. *Lake* v. *Gilchrist*, 955.

GARNISHMENT AND GARNISHEE.

1. The debtor of a corporation may be garnisheed by a creditor of the corporation under the general law of garnishment; but no proceeding can be had under the act of 1841, to subject the debts of stockholders for stock due the company, on

GARNISHMENT AND GARNISHEE—(CONTINUED.)

process of garnishment, issuing previous to the passage of that act. *De Mony, Garnishee*, v. *Johnston*, 51.

2. When a garnishee answers that he has received a notice of the assignment or transfer of the debt in respect to which the garnishment issues, from a person residing without the State, the Court should order publication for six months, before proceeding to consider the validity of the assignment: and if the Court decide that the assignee is properly before it, without publication, or the personal service of notice, the appearance of an attorney subsequently, for the assignee will not cure the irregularity. *Sheppard, et al.* v. *Buford*, 90.

3. J. B. the plaintiff in a judgment against E. S. obtained judgment upon garnishment against sundry persons who had become indebted to the latter, by having their accounts due W. P. S. transferred to E. S. in consideration of a note made by W. W., which E. S. assigned to W. P. S.: *Held*,—that if the plaintiff prosecuted his garnishments with a knowledge of the circumstances under which E. S. became the proprietor of the accounts due W. P. S., or if, after having acquired such knowledge, he attempted to coerce a collection of the judgment against the garnishees, he impliedly admitted the validity of the transaction between E. S. and W. P. S. and could not proceed against W. W. to condemn the sum due upon his note. *Ib.* 91.

4. When there is no levy of an attachment, but a garnishee is summoned, who vouches one to whom the debtor has assigned the demand before service, and such proceedings are had, that all connected with the garnishment are discharged, a judgment entered by default against the debtor is irregular, and will be reversed on error. *Edwards* v. *Wickliffe*, 715.

See Principal and Agent, 6.

GIFT.

1. Property sent home with a new married couple, will be presumed to be a gift, unless at the time a less estate is declared, or limited. Whether such a transaction is a gift, or a mere loan, is a question of intention; any fact therefore, which affords evidence of such intention, is admissible as a part of the *res gestæ*. *Olds* v. *Powell*, 652.

2. A declaration by the parent at or about the time, is evidence of his intention, though made in the absence of the son in-law; a declaration made previously, or act done, upon the marriage of another daughter, as to his intention in respect to his future sons-in-law is not admissible in evidence. *Ib.*

GRANTS.

1. A grant may be made by a law, as well as by a patent pursuant to a law; and a confirmation by a law, is as fully to all intents and purposes a grant, as if it contained in terms a grant *de novo*. *Hallett and Walker et al.* v. *Doe ex dem. Hunt, et al.* 882.

GUARDIAN AND WARD.

1. Where one acting as the guardian of a lunatic, purchased for him a life interest in land, of which the lunatic was the remainder man, and upon his restoration to reason went into possession of the land, retained it two years, cultivating it and taking the profits, and sold it to another and delivered the possession: *Held*, that this was an affirmance of the contract made by the guardian, and that although he could not recover rent from his former ward, yet in equity he might recover the purchase money of the life estate and interest thereon. *Gurley* v. *Davis, et al.* 315.

HUSBAND AND WIFE.

1. An act of the Legislature authorizing a married woman to act and dispose of all property subsequently acquired by her, by her own exertions, or from other persons, as a *feme sole*, with a saving as to existing creditors, will not have a retrospective effect, so as to deprive the husband or his creditors of the benefit of any property which previously belonged to the wife. *Carleton & Co.* v. *Banks*. 32.
2. Previous to marriage, a deed was executed conveying to a trustee a slave, and securing to the female a life interest therein, with remainder to others. The trustee delivered the slave to the female, who either before or after such delivery married. *Held*—that the life estate was subject to sale, under execution, by the creditors of the husband, notwithstanding the act previously cited; and that it was unimportant whether the possession was delivered before or after the passage of this act. *Ib.*
3. Whether the sale would affect the ri ht of survivorship, *quere?* *Ib.*
4. A settlement by a husband after marriage of the property thereby acquired to a trustee, for the joint use of himself and wife, for their lives, with remainder for life to the survivor, and remainder in fee to the issue of the marriage, is not the convevance of a separate estate to the wife, but the husband has under the deed an estate for life. *Branch Bank at Montgomery* v *Wilkins*, 589.
5. Such an estate is subject to execution and sale for the debts of the husband; the deed containing a stipulation that he shall have the possession, and be entitled to the rents and profits. *Ib.*
6. When the plaintiff declares on the common counts against husband and wife, for work and labor at the instance of the wife, a recovery is proper, though the evidence discloses a contract with the wife when sole, and the performance of the service after the intermarriage. *Sprague and Wife* v. *Morgan and Wife*, 952.

See Executions, Writ of 19.

INDORSER AND INDORSEE.

1. When the liability of an indorser has not been fixed by notice, the fact that he has taken an indemnity from the maker, after the maturity of the note, will not have the effect to charge him on the indorsement. *Lowry's Admr's* v. *The Western Bank of Georgia*, 120.
2. It is not enough to show that notice was sent through the post office addressed to the drawer of a bill at a particular place, but it should be proved that he resided there, or that that was the place at which notice should have been addressed to him. *Crawford* v. *Branch Bank at Mobile*, 205.
3. Each party to a bill has until the day after he has receiv d notice of its dishonor, to give or forward notice to his prior indorser, and so on until the notice has reached the drawer. *Ib.*
4. Where a suit is brought in the name of the payee of a promissory note, for the use of a third person, to whom it appears to have been regularly indorsed, the form of the action is an acknowledgment that the indorsee is the proprietor of the paper, and the suit cannot be supported by the payee. *Hunt* v *Stewart*, 525.
5. The provision of the act of 1828, which requires the consent of the indorser, in order to excuse the failure of the indorsee to sue the maker or obligor within the time prescribed, to be given in writing, applies only where the amount in con-

INDORSER AND INDORSEE—(CONTINUED.)

troversy does not exceed fifty dollars: in other cases a verbal consent is binding on the indorser. *Litchfield* v. *Allen & Falconer*, 779.

See Bills of Exchange & Promissory Notes, 9, 12, 13, 14, 16.

See Consideration, 1.

See Lien, 2.

See Vendor and Vendee, 8.

INTENDMENTS AND LEGAL PRESUMPTIONS.

1. When the construction of a will depends upon extrinsic facts, a Court of error, in reviewing a decree of final settlement made under the will, will intend that the necessary facts were proved to sustain the decision, unless the contrary is shown by an exception. *Boyett, et al.* v. *Kerr*, 10.
2. A party excepting to the ruling of the Court against him must show affirmatively the existence of error, and an appellate Court cannot aid him by presuming what the record does not discover. *Knapp v. McBride & Norman*, 20.
3. The consent of a beneficiary of a trust deed will not be presumed, where the deed postpones the payment of the secured debt, beyond the time when it fell due by the contract of the parties. *Kemp & Buckey* v. *Porter*, 138.
4. Where the defendant in execution is in possession of property, the presumption is, that he is the owner of it, and upon a motion against the sheriff for failing to make the money upon the execution, it devolves upon the latter to show that the property was not subject to levy and sale to satisfy the same. *Leavitt* v. *Smith, et al.* 176.
5. It cannot be judicially known, that a person who was elected by the Legislature as one of the directors of a Bank, was appointed by the board its president *pro tem.*, merely because he certifies that a debt sought to be recovered by notice, is *bona fide* the property of the Bank. *Crawford* v. *The Branch Bank at Mobile*, 206.
6. Where a woman who has a female slave and her increase, settled upon herself and children by her father's will, marries and survives her husband, and afterwards goes with the slaves and resides with a son of her husband for twenty years—all the time exercising the uninterrupted control over them, it cannot be assumed that the son had possession of them. *Doyle* v. *Bouler*, 246.
7. The sheriff is not authorized to pay the money due on a judgment, and keep the execution open for his own benefit. But, *quere*, if the defendant avail himself of the payment, by moving to quash the execution, is not a previous request to pay, or a subsequent adoption of the act, the necessary inference. *Rutland's Adm'r* v. *Pippin and another*, 469.
8. *Quere*—Where a writ issued on a promissory note dated two years previously, against W. E. N., and A. M. N., describing their connection thus, "who as partners signed as W. E. & A. M. N." is it a legal presumption that they were partners when the writ was sued out. *Nall* v. *Adams*, 475.
9. It will be intended that the payee and indorser of a promissory note is the same person, where the only difference in the names, is, the insertion of the initial of a middle name in the indorsement. *Hunt, use* v. *Stewart*, 525.
10. A check drawn upon the Bank payable to bearer, indorsed by the proper officer that it was "good," is *prima facie* an admission by the Bank, that the money

INTENDMENTS AND LEGAL PRESUMPTIONS—(CONTINUED.)

drawn for, is in Bank subject to the order of the drawer. This presumption may be repelled by proof, as that the admission was made by mistake. *Smith* v. *Branch Bank at Mobile*, 880.

See Bills of Exchange and Promissory Notes, 11.

See Fraud, 7.

See Partners and Partnership, 5.

INTEREST.

1. Where a bill is filed for the purpose of subjecting a sum of money in the hands of a third person, to the payment of a debt due the complainant, if such person is enjoined from using it, does not offer to bring it into Court, &c., but insists upon his right to retain it both as against the complainant and his debtors, he will be charged with interest. *Kirkman, et al*, v. *Vanlier*, 218.
2. Where the maker of a promissory note makes a partial payment on it, before it matures, without an agreement, either express or implied, that interest shall be added, upon such advanced payment up to the maturity of the note, he will not be entitled to a deduction therefor. *Handley* v. *Dobson's Adm'r*, 359.
3. A note discounted by the Bank after its maturity carries the legal rate of interest. *Lester* v. *The Bank of Mobile*, 490.

JUDGMENT AND DECREE.

1. A Court may at the same term at which it renders a judgment, set it aside, and retrace its steps, and a writ of error will not lie to review its action in recalling its judgment. *Johnson* v. *Lattimore*, 200.
2. The judgment entry recited, that the defendant's attorney moved to quash the execution and return "on the ground of irregularity, the same having been issued contrary to law, to an improper officer, and the return having been made by an officer legally incompetent to act in the premises; being seen and heard by the Court, the same is granted, and the execution and return accordingly quashed."—*Held*, that the reasons stated in the motion to quash are conclusions of law, without any affirmation of fact on which they rest: and the execution appearing upon its face to be regular, and there being nothing upon the record to show that it was addressed to, or executed by an improper officer, the judgment by which it was quashed cannot be sustained. *Wilson* v. *Auld*, *Ex'r*, 302.
3. A judgment was rendered against the appellant, (who was administrator,) *de bonis intestatis;* at a subsequent term a judgment was rendered against his surety for the appeal, and execution directed against both: *Held*, that the entries only authorized one execution, *de bonis intestatis* as to the principal, and *de bonis propriis, &c.* as to the surety; that if the judgment as to the surety was erroneous, the error was at most a mere clerical misprision, amendable in this Court, under the statute, at the cost of the plaintiffs in error. *Bancroft, Adm'r.* v. *Stanton* 351.
4. After the plaintiff has taken issue informally upon a plea of the insolvency of the estate of which the defendants are sued as administrators, and which plea is conceded to be substantially good, it is error if the judgment entry recites that it was overruled by the Court. *McVay's Adm'rs v. Krebs*, 456.
5. In this State a judgment binds lands only from the time of its rendition, and has no relation to the first day of the term. *Quinn et al.* v. *Wiswall*, 645.

JUDGMENT AND DECREE—(CONTINUED.)

6. The sale under a junior judgment which is not a lien upon the lands sold, cannot be sustained by referring the sale to the authority given by an older execution, and judgment, when the older execution was not in the sheriff's hands at the time of the sale. *Ib.*

See Error, Writ of, 5.

See Orphans' Court, 10.

See Practice at Law, 13.

See Process and Service of, 5.

JUDGMENT NUNC PRO TUNC.

1. A judgment *nunc pro tunc* may be rendered against the surety in an appeal bond, at a term subsequent to that at which a recovery was had against the appellant; and the judgment against the appellant, together with the appeal bond, will be sufficient to authorize such a judgment against the surety. *Bancroft, Adm'r* v. *Stanton*, 351.

JURISDICTION.

1. This jurisdiction is not taken away by the circumstance, that the steamboat is employed in conveying the mail of the United States. *Monroe & Tardy* v. *Brady*, 59.
2. When a transcript from the Commissioners' Court discloses that the Court had jurisdiction over the subject, the time when it held its session cannot be inquired into collaterally. *Lewis, et al.* v. *The Intendant and Town Council of Gainesville*, 85.
3. It is questionable whether this Court can entertain jurisdiction when the final decree is *pro forma* by the consent of the parties; but when the agreement is that such a decree shall be rendered, but none in point of fact is given, the writ of error will be dismissed. *Elmes* v. *Sutherland*, 263.
4. The act of 1843 which directs appeal and certiorari cases, then pending in the Circuit Court of Mobile county, to be returned to the County Court, does not call upon the Court to repudiate an appeal cause of its own mere motion; and when a case depending in that Court, at the passage of the act, is determined there without objection, the judgment will not be reversed. *Vaughan, et al.* v. *Seed*, 740.
5. A record of the Orphans' Court cannot be collaterally impeached, if the Court obtained jurisdiction to make a division of real estate, proceeded to render a final decree, and the commissioners in fact made a division. *Moore, et als.* v. *Clay*. 742.
6. A decree was rendered for the sale of the real estate of an intestate, upon a petition by the administratrix, that the same could not be *fairly, equally and beneficially divided among the heirs;* it was objected in a collateral suit that it did not appear from the record, that the guardian of the infant children of the intestate answered the petition: that the testimony was taken by the petitioner without notice to the heirs; that a deed was directed to be made to the purchaser under the decree, although the purchase money was not paid; that the infant heirs of the intestate had no notice of the proceedings in the Orphans' Court: and that the publication was made without an order of Court, although the fact of non-residence was not verified by the oath of the administratrix: *Held*, that although these objections might be sustained by the record, they do not show a want of

JURISDICTION—(CONTINUED.)

jurisdiction in the Orphans' Court, or establish the nullity of its decree, but are mere irregularities, for which a revising Court might reverse, without affecting the purchaser's title. *Perkins' Ex. et al.* v. *Winter's Adm'rx*, 855.

7. The Orphans' Court may take jurisdiction and order the sale of the real estate of a deceased person, although the decedent had executed a mortgage thereon, which was undischarged; and the purchaser at such a sale, will become invested with the title of the heirs of the mortgagor. *Ib.*

See Practice at Law, 13.

JURY AND JUROR.

1. When a struck jury is demanded by either party, the list of jurors from which the striking is to be made, must be subject to no good cause of challenge. *Davis* v. *Hunter*, 135.
2. A bias or prejudice against crime in general, is not such as will constitute a good challenge for cause. *Ib.*
3. After a juror states that he is not sensible of any bias or prejudice in the case, it not erroneous to refuse a further examination of the juror. *Ib.*

See Court, Circuit, 1.

See Criminal Cases, and Proceedings in, 3, 4.

See Practice, 7.

JUSTICE OF THE PEACE.

1. When an appeal is taken, in an admiralty suit, from the judgment of a justice of the peace, rendered in the city of Mobile, it is no valid objection in the Circuit Court, that the justice was elected for a country beat, and therefore, under the statute disqualified to act in the city. *Monroe & Tardy* v. *Brady*. 59.
2. A justice of the peace has jurisdiction under the acts of 1824 and 1841, in libel suits, by material men, &c. against a coasting steamboat, when the sum claimed is not more than fifty dollars. *Ib.*
3. This jurisdiction is not taken away by the circumstance, that the steamboat is employed in conveying the mail of the United States. *Ib.*
4. In appeals from justices of the peace it is not necessary for the parties to make up an issue upon paper, and where the defendant relies on a tender, it is competent for the Court to require him to prove every fact, necessary to make out such a plea formally pleaded. And where in such case the word "tender," is found written in the transcript, but not signed by counsel, it cannot be intended that it was received by the plaintiff as a plea, and thus preclude him from insisting at the trial that the money was not in Court. *Harbin v. Knox*, 675.

LAND TITLES SOUTH OF LATITUDE 31.

1. The effect and design of the various acts of Congress, confirming incomplete titles to land in Florida, it would seem was not to legislate upon the title, but by the disavowal of title in the United States, to remove all obstacles to the settlement of controversies relating to the title by the judicial tribunals. But, where Congress confirms the title to the same land, to two individuals, the confirmation is merely a disavowal by the United States in favor of both parties, of all right and title to the land in dispute. Each, therefore, must rely on the strength of his own title, and although, in such a case, a patent may issue, it adds nothing to the title derived from the United States, which was complete, so far as it de-

LAND TITLES SOUTH OF LATITUDE 31—(CONTINUED.)

pended on the United States for its validity, by the act of confirmation. *Eslava* v. *Doe ex dem. The Heirs of Farmer*, 543.

2. Where the United States relinquishes title to land to the "heirs" of a British subject, it must be understood that the term *heirs* is used in reference to our laws, and not the English law of primogeniture. *Ib.*

3. The act of 1819 in respect to certain claims to land, south of latitude thirty-one, west of the Perdido, and east of New Orleans, embraces several distinct classes of claims; the first is "Perfect grants." These are recognized as valid and complete in themselves, and do not require a patent to issue, or further act by the government to impart to them legal validity: it is admitted that *per se* they possess this quality, and operate *proprio vigore*. *Hallett and Walker, et al.* v. *Doe ex dem. Hunt, et al.* 882.

4. It was clearly competent for Spain, while it continued in possession of the territory ceded to the United States by the treaty of Paris, to grant the lands within the same, with the assent of the United States; and the subsequent recognition of such grants by Congress, will impart to them validity. *Ib.*

5. The first class of claims embraced by the act of 1819, are not affected by the requirements of the eleventh section of that act, and it is not essential to the title of claimants coming within that category, to cause surveys to be made of the lands to which their title has been recognized. *Ib.*

6. A commissioner appointed to investigate and report upon claims to land, within the territory ceded to the United States, by the treaty of Paris of 1803, stated in his report, the number of acres granted to a claimant by the Spanish government; afterwards Congress by statute recognized the title of the grantee as complete, independent of the right of the United States: *Held*—that the title must operate co-extensively with the terms of the grant, although it may embrace more land than the quantity stated in the commissioner's report. *Ib.*

7. *Semble*—Inchoate claims to lands were not changed in their character, by the treaty which ceded Louisiana to the United States; that treaty only imposed upon the Federal Government a political obligation to perfect them; and when the government exercises its powers and confirms the title to one of several adverse claimants, the title thus confirmed, must necessarily in a Court of law be considered paramount. *Ib.*

8. The leading point of Hagan et al. v. Campbell and Cleaveland, 8 Porter's Rep. 9, in which it was determined that the north and south lines of the Spanish grant then in question, continued eastwardly without deflection to the channel of the river, is reaffirmed. *Ib.*

LEGACY AND DISTRIBUTIVE SHARE.

1. *Quere?*—Whether a statement by the testator, proved in a nuncupative will, that he wanted one sum of money appropriated to the schooling of three of his children, and another sum to the like purpose of two other children, is not to be considered as the creation of a trust, and not as a legacy. *Quere*—Also, whether these trusts or bequests do not lapse in the event of the death of the *cestui que trust*. *Boyett, et al.* v. *Kerr*, 9.

2. The bequest of freedom to a slave after the determination of a life estate in the same slave, created at the same time, must be construed with reference to existing laws, and not with reference to laws as they may exist at the time when the bequest if effectual, would vest. Such a bequest is void under the existing laws,

LEGACY AND DISTRIBUTIVE SHARE—(CONTINUED.)

and therefore a bequest of money to the executor, to be used for the benefit of the slave is void, and it falls into the general residuum of the estate. *Alston v. Coleman, et al.* 795.

3. A creditor, or legatee, has the right to pursue the assets of an estate, whenever there is reason to apprehend their misapplication by the executor, either voluntarily, or by coercion of execution, in satisfaction of his own debts. *Williamson* v. *The Branch Bank at Mobile*, 906.

See Wills and Probate of, 2.

LIEN.

1. The defendant in execution was in possession of a lot under a deed executed on the 1st of April, 1837, by J. C. M., as treasurer of the commissioners appointed to sell lots in the town of Livingston, with covenant of warranty; in December, 1838, the defendant in execution bargained and sold the lot, to a third person, to whom he delivered the possession. In June, 1838, the plaintiff obtained his judgment—on the 5th of August, 1839, the lot in question was sold under a *fieri facias* issued thereon, and in October, 1840, a patent was issued by the United States to the commissioners, &c., for the tract of land of which the lot was a part: *Held* that the judgment operated a lien upon the lot before the sale by the defendant in execution, and that the vendee of the latter might be dispossessed by action at the suit of the purchaser at the sheriff's sale. *Land* v. *Hopkins*, 115.
2. The equitable lien of the vendor of land, will pass to his assignee of a note taken from the vendee in part payment of the purchase money, and will not be lost, though the assignee neglect to sue the maker for so long a time as to discharge the assignor from liability upon his indorsement. *Roper* v. *McCook and Robertson's adm'r*, 318

See Executions, Writ of, 2, 3, 9, 13, 14, 15.

LIMITATION BY DEED OR WILL.

See Will and Probate of, 2.

LIMITATIONS AND NON-CLAIMS, STATUTE OF.

1. The judgment upon the probate of a will cannot be reviewed by a writ of error after the lapse of three years, between the judgment and the suing of the writ of error. *Boyett, et al.* v. *Kerr*, 9.
2. Where the possession of personal property, is held adversely, for a period beyond that prescribed by the laws of the State as a bar to an action, the original owner cannot successfully assert a title against such possessor, and the bar will be recognized in any country to which the property may be taken. *Doyle* v. *Bouler*. 246.
3. A replication to a plea of the statute of limitations, that the note was made in South Carolina, and that the defendant moved from that State before six years had expired after the making of the note, tenders an immaterial issue. *Watson* v. *Brazeal*, 451.
4. The payee of a promissory note agreed with the principal maker to extend the time of payment, and received from him a substituted note, subscribed with his name and that of his surety; suit being brought upon the substitute, the surety

LIMITATIONS AND NON-CLAIMS STATUTE OF—(CONTINUED.)

denied the genuineness of his signature, and a verdict was returned in his favor. Afterwards the surety was sued upon the original note, and pleaded the statute of limitations, which it seems had run pending the first suit: *Held*, that the facts did not prevent the operation of the statute, there being nothing to show that the surety participated in, or connived at the forgery of his name after it was discovered. *Branch Bank at Decatur* v. *Lanier*, 595.

5. The statute of limitations will not run, so as to take from a plaintiff the benefit of a *payment* made to the defendant—there being mutual accounts between them. The statute applies only to causes of action, and then only after the right to sue has accrued. *Lucas* v. *Thorington's Adm'r*, 605.
6. A promise to pay, without designating any time, imposes a present duty, and the statute of limitations begins to run immediately. *Owen* v. *Henderson*, 642.
7. Where, in an action for defamatory words the defendant pleads the statute of limitations, the *onus* lies upon the plaintiff of proving that the words charged, or some of them that were actionable, were uttered within twelve months preceding the commencement of the suit. It is not indispensable to the admission of evidence upon such an issue, for the witness to state the precise time within that period when the words were spoken, but the defendant may make his examination searching and minute upon the point. *Teague* v. *Williams*, 844.
8. A check drawn upon the Bank payable to bearer, indorsed by the proper officer that it was "good," is *prima facie* an admission by the Bank, that the money drawn for, is in Bank subject to the order of the drawer. This presumption may be repelled by proof, as that the admission was made by mistake. *Smith* v. *Branch Bank at Mobile*, 880.
9. Such a debt, if due, is not barred by the statute of limitations of three years. *Ib.*

See Executors and Administrators, 3.

MANDAMUS.

1. If a suit is improperly abated by order of Court on account of the plaintiff's death, its reinstatement may be coerced by *mandamus*. *The State, ex rel. Nabor's Heirs*, 459.

See Error, Writ of, 14.

MORTGAGOR AND MORTGAGEE.

1. Where a mortgage states, the debt intended to be secured, at an amount greatly beyond what is due, this at most is *prima facie* evidence of fraud, and may be repelled by showing the fairness of intention *on the part of the mortgagee*. *Stover* v. *Herrington, et al*, 142.
2. A mortgagee by purchasing a part of the mortgaged property in payment of a debt not secured, does not prejudice his mortgage as to the remainder. *Ib.*
3. Where a mortgagee who was a surety for the payment of the debt, against which the mortgage was intended to indemnify him, executed as the surety of the mortgagor, a bond for the prosecution of a writ of error, sued out by the latter, to cause to be revised a several judgment rendered against him, upon one of the debts provided for, the mortgagee will not thereby defeat the mortgage, or in any manner affect its validity. *Ib.*
4. Where the principal executes a mortgage for the indemnity of his surety, and a judgment is afterwards rendered against the principal and surety for the debt intended to be secured, but before such judgment is obtained, other judgments

MORTGAGOR AND MORTGAGEE—(CONTINUED.)

are rendered and executions issued, so as to create a lien upon the principal's property, the surety cannot in virtue of the lien of his mortgage, give a preference to an execution of the plaintiff in the judgment against himself and principal; but if he would make his security available he must proceed under the mortgage. *Ib.*

5. Where a mortgagee under the impression that a judgment and execution for the debt intended to be secured, will draw to them the lien of the mortgage, causes the mortgaged property to be levied on and sold, and becomes himself the purchaser; if he afterwards discover that other liens superior to the execution under which the sale was made, attached after the mortgage was executed, he may go into equity, and foreclose the mortgage; especially upon his stipulating that the property shall sell for as much as it did at the execution sale. *Ib*, 143.

6. Although a mortgagee may have purchased in the equity of redemption, he has the right to apply to a Court of Chancery for a foreclosure, and to quiet his title, as a Court of Chancery always looks with suspicion upon such transactions. To such a bill, the administrator, if the estate has been declared insolvent, is a necessary party, to enable him to show, if he can, that the equity of redemption has been purchased at too low a rate, or a fraud in the sale. *Heirs and adm'r of Hitchcock* v. *United States Bank of Pennsylvania*, 388.

7. In such a case, if there is no suggestion that the mortgaged property will sell for more than the mortgaged debt, the complainant may take a decree for a strict foreclosure. *Ib.*

8. In ascertaining whether a contract is a mortgage, or a conditional sale, the form of the contract will be controlled by the intention of the parties: *Eiland, Adm'r* v. *Radford*, 724.

9. Some of the tests by which it may be ascertained in a doubtful case, whether a mortgage, or conditional sale was intended, are—did the relation of debtor and creditor subsist before the alledged sale—did the transaction commence by a proposition to lend, or borrow money—was there a great disparity between the value of the property and the price agreed to be given for it—did the vendor continue bound for the debt—these facts, or any of them, if found to exist, go far to show, that a mortgage was intended, and not a conditional sale. *Ib.*

10. A power of sale given by the mortgage, does not divest a Court of Equity of jurisdiction to decree a sale. *McGowen, et al.* v. *The Branch Bank at Mobile*, 823.

11. Where two mortgages are executed by different mortgagors, to secure the *same debt*, both may be foreclosed in the same suit. *Ib.*

See Chancery, 28.

See Chancery Practice, 20, 21.

See Conflict of Laws, 2.

See Deeds of Trust, 9, 10, 11.

See Jurisdiction. 7.

See Orphans' Court, 11.

See Trust and Trustee, 7.

NOTARIES PUBLIC AND PROTESTS.

1. Where commercial paper is placed in the hands of a notary for demand and protest, if he has not given notice to the drawer and indorsers, he must inform the holder with all reasonable despatch what he has done; and if he has undertaken to give notice, he must perform this duty in such a manner as not to prejudice the holder's rights. *The Bank of Mobile* v. *Marston*, 108.
2. The certificate in the protest of a notary setting forth the demand and refusal of an inland bill, &c., and notice to the drawer and indorsers, is made evidence by statute, yet it is not conclusive; and it is competent for the party to show such a state of facts, as prove that the certificate is untrue. *Ib.*
3. Where the notary certifies that he has given notice of the dishonor of paper to the drawer or indorsers, and the holder in consequence thereof, fails to give it, if the certificate of the notary is false, he will be bound to make good any loss which may result from its falsity. *Ib.*
4. The measure of damages in an action against a notary for failing to give notice of the dishonor of paper according to his undertaking, must be graduated by the injury sustained by the neglect; in estimating which, the solvency of the party to whom the notice was given, is an important element. *Ib.*
5. The notary public who protests a foreign bill is authorized to give notice of its dishonor to all persons who are responsible to the holders, and a notice describing himself officially to which his name is *printed* instead of *written* is good. In such case it may be intended from the similarity of the name that the person who made the protest, was the same who gave the notice, although there is no official seal attached to the notice. *Crawford* v. *The Branch Bank at Mobile*, 205.

NOTICE.

1. A notice at the suit of a Bank against one of its debtors, was received by the sheriff on the 20th April, 1842, executed on the 7th May thereafter, and informed the defendant that the plaintiff would move for judgment against him "at the next term," &c., "to be holden," &c., in 1841. In May, 1842, the defendant appeared and filed a plea *in propria persona: Held*,—that the fair inference was, that the motion was to be submitted at the term of the Court next succeeding the time when the notice was issued and served, that so much of the notice as particularizes the time when the Court is to sit, may be rejected as surplusage; and that an appearance and plea to the merits is a waiver of the objection to the process, if it were otherwise available. *Crawford* v. *The Branch Bank at Mobile*, 205.
2. An objection taken at the trial to the notice, certificate and note, is not sufficiently specific to reach a supposed defect of authority in the person serving and returning the notice. *Crawford, et al.* v. *Branch Bank at Mobile*, 383.
3. Notice given at the time of a sheriff's sale of an unextinguished equity, is sufficient to charge a purchaser, and in this respect there is no distinction between sheriff's and other sales. [ORMOND, J. delivering opinion of the majority of the Court.] *Williamson* v. *Branch Bank at Mobile*, 907.

See Bank, 7.

ORPHANS' COURT.

1. The judgment of the Judge of the County Court upon the probate of a will, and his decree of final settlement of the estate under the will, cannot be joined in the same writ of error. *Boyett, et al. v. Kerr*, 9.

ORPHANS' COURT—(CONTINUED.)

2. The proper course of practice in the County Court in testamentary causes is, for the person producing the will and asking probate to propound the will, to the Court in writing, with the usual facts necessary to be proved, and informing the Court what persons will be entitled to distribution if the will is invalid. *Ib.*
3. In order to make a valid decree for the final settlement of an estate, every party entitled to distribution must be brought in some way before the Court. When persons entitled to distribution under a will, die before a settlement, it is necessary that their personal representatives should be before the Court at the final decree. *Ib.*
4. A sale of land by three Commissioners, made by order of the Orphans' Court, is valid under the act of 1822. *Beck* v. *Simmons & Kornegay*, 71.
5. Where one purchases land at a sale made by order of the Orphans' Court, and goes into possession, and remains in possession for two years, exercising ownership over it by cultivation, and clearing the timbered land, &c.,—he cannot rescind the contract, although the Orphans' Court had no jurisdiction to direct the sale, unless the heirs are unable or unwilling to make a good title to the land. *Lamkin, et als.* v *Reese, et als.* 170.
6. Where a mistake has been made in the decree of the Orphans' Court, as to the description of the land intended to be sold, which mistake is continued in the advertisement of the commissioners, the contract cannot be rescinded for that cause, if the purchaser was not deceived thereby, but got the land he intended to purchase, and the Court and the commissioners intended to sell. Nor will a bill in Chancery be entertained to correct the mistake, unless upon application to those having the power to rectify it, they refuse to do so. *Ib.*
7. No question can arise in this Court, as to the reasonableness of the compensation, unless made in the Orphans' Court. *Carroll, et al.* v. *Moore, Adm'r.* 615.
8. An administrator, who has paid any of the distributees, may on proof of the fact, have satisfaction entered. *Ib.*
9. The Orphans' Court cannot decree, that the sureties, on satisfying the decree rendered, be discharged from further liability—that can only be ascertained, by a proceeding upon the bond itself, before a competent tribunal. *Ib.*
10. Where a decree has been made by the Orphans' Court directing an executor to convey land, which his testator in his lifetime had sold, and agreed by bond to make titles for, the jurisdiction of that Court attaches upon the filing of a petition, setting out the sale, the agreement by bond, &c., to convey, the death of the obligor, and the grant of letters by the Court to which the petition is made; and such decree cannot be collaterally impeached when the jurisdiction has attached though there may be error in the proceedings. *Samuels* v. *Findley*, 635.
11. The Orphans' Court may take jurisdiction and order the sale of the real estate of a deceased person, although the decedent had executed a mortgage thereon, which was undischarged; and the purchaser at such a sale, will become invested with the title of the heirs of the mortgagor. *Perkins' Ex'r* v. *Winter's Adm'rx*, 855.
12. Where lands are sold by commissioners, under an order of the Orphans' Court, the sale confirmed, the commissioners *ordered* to make a "conveyance by deed" to the purchaser, and bonds for the payment of the purchase money executed by the latter, the rule of *caveat emptor* applies, and the purchaser can claim no indemnity, for any incumbrance that may rest on the title. *Ib.*

ORPHANS' COURT—(CONTINUED.)

13. Commissioners appointed by the Orphans' Court to sell land, and ordered to execute a deed to the purchaser, are in no default if they do not look him up, and tender a conveyance. It is enough if they deliver to the purchaser a deed on demand. *Semble:* if the commissioners refuse to execute the order of the Orphans' Court, that Court might cause a conveyance to be made, or, if its powers are inadequate, Chancery could lend its aid. *Ib.*

14. Where an insolvent estate was in process of being audited, at the time of the passage of the act of 1843, for the settlement of estates in the Orphans' Court, the law previously existing will govern and control it; but where the initiatory steps only have been taken, the proceeding so far as it has progressed, will be governed by the former law, but so far as subsequent action is had, it must conform to the act of 1843. *Martin, Adm'r,* v. *Baldwin,* 923.

See Error, Writ of, 14, 19.

See Executors and Administrators, 9.

See Jurisdiction, 5, 6.

See Sale, 3.

See Vendor and Vendee, 9.

PARENT AND CHILD.

1. A father may sue in case for an injury done to an infant child (then living with and engaged in his service) by dogs, permitted by the defendants to run at large after a knowledge that such dogs were accustomed to bite mankind. *Durden v. Barnett & Harris,* 169.

See Contract, 5.

See Gift, 1, 2.

PARTNERS AND PARTNERSHIP.

1. One partner may bind the firm by contracts relating to the partnership, and when a note made by one partner in the name of the firm is put in suit, it is not incumbent on the plaintiff in the first instance to show that the note was given for a partnership transaction, for such is the legal intendment. If the note was given for the individual debt of the partner making it, with the knowledge of the party to whom it was given, these facts must be shown in defence to the action. *Knapp* v. *McBride & Norman,* 20.

2. The death of one of several partners, operates a dissolution of the partnership, unless its continuance is provided for by express stipulation. But, *quere*—where one partner gives a power of attorney in the firm name with authority to make notes, draw bills, &c., and after his death, the attorney without a knowledge thereof, makes a negotiable note in the name of the partnership, ante-dated of a day when the deceased partner was in life, which goes into the hands of a *bona fide* holder, without notice, may it not be enforced against the surviving partner, although it was given in payment of the deceased partner's debt? *Ib.*

3. Although service of process on one partner is sufficient to bring in the firm where the partnership is continuing, yet the plaintiff is not bound to accept such service, but may require all the partners to be notified of the pendency of the suit. If the plaintiff declares against all the members of the firm, he may discontinue as to those not served with process, and if he omits to take judgment against them,

PARTNERS AND PARTNERSHIP—(CONTINUED.)

without a discontinuance in fact, a co-defendant against whom judgment was properly rendered, cannot avail himself of the irregularity on error. *Nall* v. *Adams*, 475.

4. T. & D. were mechanics working in partnership; T. agreed with W. to do some work on his house, for which the latter was to pay him in board; there was no evidence to show whether D. was present when the contract was made, or that he knew anything of its terms. Both T. & D. did the work, and T. boarded with W. while they were doing the work, and for a sufficient length of time thereafter, for his board to amount to a sum equal to the price of the work: *Held*, that the contract was valid, and that the work being paid for as stipulated, an action could not be supported to recover the price of it, in consequence of any interest of D. *White* v. *Toles & Dunlap*, 569.

5. In professional parnerships formed for the practice of the law, if one member of the concern acknowledges the receipt of money for a client, the latter need not inquire how the claim was collected, or whether paid at all, or not, but may charge the firm upon the assumption that the receipt expresses the truth; and the partner who had no agency in giving the receipt cannot gainsay its truth. *Cook & Lamkin v. Bloodgood*, 683.

6. Although the perception of profits, as such, imposes on the persons receiving them, all the obligations of a partner as to third persons, as between themselves they may by their own contract, regulate their respective liabilities in any manner they think proper; and may therefore stipulate that one shall not be liable for the debts of the firm. *Pollard* v. *Stanton*, 761.

See Attorney at Law, 3, 5.

See Intendments and Legal Presumptions, 9.

See Pleadings, 18.

PENALTY.

1. A penalty created by statute for the omission to do a particular act, cannot be relieved against in Chancery, any more than at law; but Chancery may entertain a bill for the discovery of facts, showing either a sufficient excuse, or to establish fraud in the party seeking to enforce the penalty. *Chandler* v *Crawford*, 506.

PLEADINGS.

1. Duplicity in a replication to a plea is bad on general demurrer, notwithstanding the act abolishing special demurrers. *Stiles* v. *Lacy*, 17.

2. In an action of covenant upon a general warranty, the averment that at the sealing and delivery of the deed, one N. had the lawful title, freehold and possession, of the land warranted, and still continues so to have, by reason whereof the grantee is, and always has been, unable to recover the possession, shows a sufficient breach of the covenant, and is equivalent to the assertion of a legal ouster. *Banks & Ready, Executors of Sims* v. *Whitehead*, 83.

3. A pending attachment may be pleaded in abatement by the garnishee, when sued for the same debt, by the original creditor. *Crawford v. Clute & Mead*, 157.

4. The plea must contain averments of all the facts necessary to give the Court in which the attachment is pending jurisdiction, and must show whether the whole or what portion of the debt has been attached. A plea in abatement therefore,

PLEADINGS—(CONTINUED.)

setting forth that garnishee process had issued upon a judgment, which did not aver the amount recovered by such judgment, or that the affidavit which the statute requires had been made, is bad on general demurrer. *Ib.*

5. A plea which affirms that the contract for the breach of which the action is brought was not seriously entered into, and if it was, it was not intended to be operative, is not obnoxious to the objection of being argumentative. *Rake's Adm'r.* v. *Pope*, 161.

6. *Semble*—the plaintiff cannot object on general demurrer that a plea is argumentative, or that it amounts to the general issue; according to the English practice he should demur specially. *Ib.* 162.

7. The plaintiff brought his action, as alledged in the declaration, for the recovery of the last of three instalments, agreed to be paid as the purchase money, for certain property sold to the defendant by him: it was pleaded by the defendant that the plaintiff had previously sued him for the two former instalments, and that he had defeated a recovery, upon proof that the contract sought to be enforced had never been entered into by him: *Held*, that the plea was good, and if supported by proof entitled the defendant to a verdict and judgment. *Ib.*

8. It is sufficient to declare in detinue for a negro woman by name, without stating her complexion, age, &c.; for a cow, without describing her color, mark, brand, &c.; or for a certain number of knives and forks, without mentioning the maker's name, character of the handles, &c. *Haynes* v. *Crutchfield*, 189.

9. A replication to a plea of the statute of limitations, that the note was made in South Carolina, and that the defendant moved from that State before six years had expired after the making of the note, tenders an immaterial issue. *Watson* v. *Brazeal*, 451.

10. If issue is taken upon a plea tendering an immaterial issue, the Court cannot instruct the jury to find against the evidence; but should after the issue is found either award a repleader, or render judgment *non obstante veredicto*. *Ib.*

11. In an action of assumpsit, for the recovery of money collected by the defendant for the plaintiff's use, the declaration alledged that the defendant "undertook and promised the plaintiff to pay that sum on demand, which though demanded, he has not done:" *Held*, that the allegation, though *informal*, amounted to a request with the omission of time and place, and was not bad on general demurrer. *Forrest* v. *Jones*, 493.

12. A plea in abatement filed within three days next after the filing of the declaration is within time, if the trial is not thereby delayed, and it is not error to refuse to strike such a plea from the file. *Comstock, et al. v. Meek & Co.* 528.

13. If a matter of defence arises after issue joined, it must be pleaded *puis darrein continuance;* if it arises pending the suit, but before issue joined, it is pleadable in bar to the further maintenance of the suit. *Burns* v. *Hindman*, 531.

14. The writ issued against B. as sheriff of Monroe county, and several persons as his sureties, but not being served on the principal the action was discontinued, and his sureties alone declared against, alledging as a breach, that B. after the execution of the bond as sheriff received divers sums of money, to wit: the sum of twenty-five hundred dollars, which was due to, and belonging to the county of M.; which, though often requested, he failed and refused to pay: *Held*, that although the breach was general, and omitted to state the circumstances under which the money was received, yet it was good after verdict and judgment, if

PLEADINGS—(CONTINUED.)

not at common law, certainly under the act of 1824, "to regulate pleadings at common law." *Broughton, et al. v. The Governor*, 561.

15. *Semble*—a replication should not contain two answers to the same plea, but it may put in issue several facts where they amount to only one connected proposition; and it may contain distinct answers to different parts of the plea, divisible in its nature. *Owen v. Henderson*, 641.

16. A replication to the statute of limitations, that the defendant held the money sought to be recovered, *in trust* for the plaintiff, is bad; the particular character of the trust should be set out, that it might be seen whether it was one of exclusive equitable cognizance, or one against which the statute does not run. *Ib.*

17. When the plaintiff styles himself to be sheriff and *ex officio* administrator of the estate of one deceased, and sues on a note payable to another person as administrator *ex officio*, of the same intestate, and the declaration alledges that the term of office of the payee having expired, the plaintiff was duly appointed *ex officio* administrator *de bonis non*, upon error, after a judgment by default, the title of the plaintiff to sue on the note must be considered as sufficiently stated. *Wagner & Hughes* v. *Chenault*, 677.

18. One partner when sued jointly with another, has the right to plead separately: therefore, when one of the partners pleaded non-assumpsit, and the plaintiff replied, that he in connection with his partner did assume, &c., to which he rejoined, that he did not assume in manner, &c., as the plaintiff in his declaration, and in his replication had alledged, to which the plaintiff demurred, and the Court sustained the demurrer: *Held*, that this was in effect an issue upon the plea of non-assumpsit, and the demurrer improperly sustained. *Plowman & McLane* v. *Riddle*, 775.

19. An allegation in the declaration, that the note was delivered to the defendant, is a clerical misprision, amended by other parts of the record, and therefore not available on error. *Allen v. Claunch*, 788.

20. Where the plaintiff consents to receive what is familiarly called a plea in short, the language of the plea will be fairly and liberally interpreted; consequently where a surety in a promissory note pleads to an action against him, "that without any consideration he placed his name to the note declared on, after the same had been made, executed and delivered to the payee, and by him accepted," his plea must be taken as a denial that there was such a consideration as would sustain his promise to pay. *Jackson's Adm'r* v. *Jackson and another*, 791.

21. A plea of *ne unques administrator*, is a good plea in a suit commenced by an administrator, profert not being made of his letters of administration, and the note sued on, not being made to him as such. *Worthington, Adm'r* v. *McRoberts & Porter*, 814.

22. The proof was, that the defendant had charged the plaintiff with swearing to a lie, before one H., a justice of the peace, of B., in a cause pending before that justice, in which the present defendant was plaintiff, and A. S. defendant; in the declaration the names of the parties to the suit, were transposed: *Held*, if the declaration referred to, and was intended to indicate the case which the witness had in view, the variance between the allegation and proof was not fatal. *Teague* v. *Williams*, 844.

23. Where the declaration charges the speaking of many slanderous words, it is competent for the plaintiff to prove that the defendant spoke some of the words

PLEADINGS—(CONTINUED.)

charged, more than twelve months before suit brought, whether actionable in themselves, or not, for the purpose *only*, of showing *quo animo* the slanderous words proved to have been spoken within the twelve months, were uttered; and this although the statute of limitations is pleaded. *Ib.*

24. A recovery may be had on the common counts although there is a special contract, whenever by its breach the plaintiff is entitled to recover a sum *in numero*, or which can be rendered certain by a mere calculation. *Sprague and Wife* v. *Morgan and Wife*, 952.

See Appeals and Certiorari, 8.
See Assumpsit, 6.
See Consideration, 3.
See Ejectment and Trespass to try Titles, 1, 2.
See Husband and Wife, 6.

PRACTICE IN CHANCERY.

1. Where an order of reference to the register is general, viz: of "the matters of account between the parties," without giving any direction as to the mode of taking testimony, whether any should be taken, or whether the same should be specially reported, it is competent for either party to lay before the register the books showing the state of accounts which it is the object of the suit to adjust, and also to examine witnesses *viva voce* in aid or explanatory thereof. *Kirkman, et al.* v. *Vanlier*, 217.

2. *Semble*—Under a general reference to a register to ascertain a fact, he should report his conclusion and need not embody the evidence upon which it is founded. *Ib.*

3. The rule of practice declaring that exceptions to testimony taken by the register must be taken before him, and certified in his report, and if not so taken the exception is waived; consequently, to authorize the Chancellor to sustain an exception, it must appear from the report to have been regularly taken, or at least to be well founded. *Ib.*

4. A bill filed by the defendant to a suit in equity, against the complainant, recited the pendency of the original cause, yet did not pray that it might be regarded as a cross bill, or that the suits might be brought to a hearing at the same time; was filed after an order of reference and report of the register in obedience thereto, but did not ask an injunction, or other order to stay proceedings in the original cause, and no such order was made; nor did the complainants therein propose to submit to a hearing on bill and answer: *Held*, that the Chancellor might with strict legal propriety, refuse to consider such a bill as a cross suit; and if it was an original independent bill, a decree dismissing it could not be revised on a writ of error sued out in the original cause. *Ib.*

5. Where a fact is alledged in a bill, which *prima facie* must be within the knowledge of the defendants, if he omits to notice it in his answer, he shall be held to have admitted it, at least so far as to dispense with proof from the complainant to establish its truth. *Ib.*

6. The complainant in a bill of interpleader, should make an affidavit that his bill is not filed in collusion with either of the defendants named therein, but merely of his own accord, to obtain the relief sought; the want of such an affidavit may

PRACTICE IN CHANCERY—(CONTINUED.)

be good ground of demurrer, but if the defendants do not demur, they cannot object at the hearing, or on error, that the bill was irregularly exhibited. *Gibson, et al.* v. *Goldthwaite*, 281.

7. A bill of interpleader puts the defendants to contest their respective claims, and if the question between them is ripe for decision, the Court decides it; but if the cause is not in that condition, the Court directs an action, or an issue, or a reference to the master. *Ib.*

8. A writ of error sued out in a Chancery case in the names of the parties to the original bill, where new ones are made by a supplemental bill, is irregular; but under the statute the writ is amendable by the record. *Toulmin, et al.* v. *Hamilton, et al.* 362.

9. Where several persons are interested in the distribution of a trust fund, this is a sufficient privity to warrant their being made parties to the same bill, either as plaintiffs or defendants. *Ib.*

10. When a bill discloses that one holding a bill, to the owner of which the right of distribution attaches, has the possession merely, and that the ownership is in another, that other is the proper party, and not the one who has the possession merely; but the omission of such a party is no reason to dismiss a bill for want of equity. *Ib.*

11. When after filing a bill some of the complainants become bankrupt, as well as some of the defendants, and some of each party are represented by a common assignee, he is properly made a party defendant, upon the supplemental bill of the remaining complainants. *Ib.*

12. If one is improperly made a party defendant, the objection is personal only and must be raised on demurrer. *Ib.*

13. Although a mortgagee may have purchased in the equity of redemption, he has the right to apply to a Court of Chancery for a foreclosure, and to quiet his title, as a Court of Chancery always looks with suspicion upon such transactions. To such a bill, the administrator, if the estate has been declared insolvent, is a necessary party, to enable him to show, if he can, that the equity of redemption has been purchased at too low a rate, or a fraud in the sale. *Heirs and adm'r of Hitchcock* v. *United States Bank of Pennsylvania*, 388.

14. In such a case, if there is no suggestion that the mortgaged property will sell for more than the mortgaged debt, the complainant may take a decree for a strict foreclosure. *Ib.*

15. It is no objection that a trustee and his *cestui que trust*, unite in the same bill: therefore, where trustees filed a bill without disclosing the beneficiary, and afterwards a supplemental bill, disclosing the fact that they were trustees for the United States Bank of Pennsylvania, and praying that it be made a party complainant to the bill; and also an amended supplemental bill, disclosing that the Bank had gone into liquidation, and that certain persons were assignees of the Bank, and praying also that they may be made parties complainant: *Held*, that all these persons constitute in law but one, representing the interest of the Bank. *Ib.*

16. An injunction may be dissolved upon the answer of those defendants within whose knowledge the facts charged in the bill must be, if they exist at all, although there are other defendants who have not answered. *Dunlap* v. *Clements, et al.* 539.

PRACTICE IN CHANCERY.—(CONTINUED.)

17. When an account is called for by the bill, and given in the answer, it is responsive matter, and entitled to be considered as evidence. *Powell, et al.* v. *Powell, Admr'x*, 582.

18. The rule of practice, which directs that all orders of publication, shall succinctly state the facts and objects of the bill, is of the same nature as the statute regulation requiring a copy of the bill to be served with the *subpœna;* but a mistake or even the entire omission to comply with the rule, is not available on error. *McGowan, et al.* v. *The Branch Bank at Mobile*, 823.

19. A discrepancy between the time at which the complainant prays the defendant may answer the bill, and that named in the order of publication is no error; the time in the prayer is immaterial, and in the publication, only so, as informing the defendant when he must answer. *Ib.*

20. Where the decree is founded on the master's report, ascertaining debts to be due not covered by the bill, and entirely omitting those which are, it is error, although no exception was taken to the report, for on the face of the decree it is shown to be wholly disconnected from the case made by the bill. *Ib.*

21. When the allegations of a bill leave it uncertain whether a mortgage, sought to be foreclosed, was executed by two of the defendants, or by one of them only, and the evidence in the cause does not remove the uncertainty, the objection is available on error, although no demurrer for this cause is interposed: but a reversal for such a cause carries no costs. *Ib.*

22. Where two mortgages are executed by different mortgagors, to secure the *same debt*, both may be foreclosed in the same suit. *Ib.*

23. Joint judgments were recovered by the complainant against the defendants, G. W., J. H. W., and R. L., all of whom it was alledged in the bill, united in a fraudulent purpose to defeat the collection of these judgments—the two former made absolute sales, professing to pass the possession and property to their respective vendees—the latter executed mortgages. All these transactions are charged to have been fraudulent, not only on the part of the defendants in the judgment, but of their vendees and mortgagees: *Held*, that as the defendants in the judgment had a common interest in its satisfaction, and are charged with a joint participation in a design to defraud, which led to the supposed fraudulent tranfers, a bill which makes them all parties, and seeks to set aside their respective conveyances, is not multifarious. *Planters and Merchants' Bank* v. *Walker, et al.* 927.

24. An application to continue a cause in equity, addresses itself to the discretion of the Chancellor, and however unwisely exercised, cannot be revised in an appellate Court. *Ib.*

25. When at the time a commission to examine witnesses issued, but one of the defendants had answered, and his counsel were duly notified of the time and place when the commission would be executed; the other defendants were in default, and a decree *pro confesso* had been rendered against them: *Held*, that the defendants who were in default cannot insist upon the want of notice, but it was competent for the plaintiff, under the statute, to make out his case by testimony taken *ex parte*. *Ib.*

26. If a defendant who is in default afterwards answers, so that a decree *pro confesso* is set aside, depositions taken without notice to him while the decree was operative, will not become inadmissible evidence. The correct practice in such

PRACTICE IN CHANCERY—(CONTINUED.)

case is, upon the decree being set aside, for the defendant to move upon a proper showing for leave to take the depositions of the same witnesses at his own instance, and a commission could issue on such terms as would protect the complainant. *Ib.* 928.

See Chancery, 7, 9.

See Vendor and Vendee, 7.

PRACTICE AT LAW.

1. In order to make a valid decree for the final settlement of an estate, every party entitled to distribution must be brought in some way before the Court. When persons entitled to distribution under a will, die before a settlement, it is necessary that their personal representatives should be before the Court at the final decree. *Boyett, et al. v. Kerr*, 9.
2. *Semble*—Where the defendant denies by plea, regularly pleaded, that he made the note on which the action is founded, the plaintiff may read the note to the jury, if he show *prima facie* that it was made by the defendant, or that he authorized it, or adopted it as his own; but in the inquiry before the Court, the examination should not be extended so far as to show, that in point of law, there is no obligation upon the defendant. When the note has been read to the jury upon the plaintiff's proof, then the defendant may adduce his evidence. *Knapp v. McBride & Norman*, 19.
3. When the person for whose use a suit is instituted dies pending the suit, it is not necessary that his personal representatives should be made parties, but the suit proceeds in the name of the nominal plaintiff. *Gray v. Turner, use of Johnson*, 30.
4. Where a cause has been tried upon an issue of fact, and verdict and judgment thereupon, it will be intended on error, that a demurrer to the declaration, found in the record, which does not appear to have been disposed of, was withdrawn by the defendant. *Carlisle v. Davis*, 42.
5. When there are several suits, by material men, laborers &c., against a steamboat, commenced before a justice of the peace, and removed into the Circuit Court by appeal, it is not an error which can be revised here, for that Court to refuse to consolidate the causes; although the consolidation would have been properly ordered by the Circuit Court. *Monroe & Tardy v. Brady*, 59.
6. The Court may permit a party in a civil cause to challenge a juror at any time before the cause is submitted to the jury, although they may have been selected and sworn. *Haynes v. Crutchfield*, 189.
7. A Court may at the same term at which it renders a judgment, set it aside, and retrace its steps, and a writ of error will not lie to review its action in recalling its judgment. *Johnson v. Lattimore*, 200.
8. It is contrary to the duty of a clerk to transmit original papers pertaining to the cause below to this Court. Copies only should be sent. *Crawford, et al. v. Branch Bank at Mobile*, 383.
9. If a suit is improperly abated by order of Court on account of the plaintiff's death, its reinstatement may be coerced by *mandamus*. *The State, ex rel. Nabor's heirs*, 459.
10. It was decided in this State, at an early day, and such has been the continuous practice, that the Court cannot order the plaintiff to be nonsuit against his consent, and whenever he submits his case to a jury he must be understood to insist

PRACTICE AT LAW—(CONTINUED.)

upon a verdict: it is consequently erroneous to coerce a nonsuit, though the plaintiff's proof may have been insufficient, and he has not been prejudiced thereby. *Hunt, use, &c. v. Stewart*, 525.

11. Issue being tendered to the facts recited in a petition, upon which an execution had been superseded, and the petitioner declining to join in the issue, and offering no testimony in support of it, but desiring to take a nonsuit, the Court was justified in rendering judgment against him and his surety. *Spence & Stinnett* v. *Walker*, 568.

12. The certificate of a clerk of an inferior Court, that a writ of error was sued out, &c., that the judgment was superseded by the execution of a bond, stating the names of the sureties, &c., if in other respects regular will authorize a judgment of affirmance, not only against the plaintiff in error, but his sureties also: this has been the practice for many years, and whether correct in its inception or not, must be adhered to, otherwise judgments long since rendered might be vacated. *Weissinger & Crook, ex parte*, 710.

13. A technical discontinuance by reason of the omission of the plaintiff to take a judgment of *nil dicit*, when a part of his debt is not answered by the plea filed, will not be enforced here. *Mallory, et al* v. *Matlock*, 757.

14. When an attachment is sued out on a debt not due, the cause is continued by operation of law, until the maturity of the debt, without any formal continuance being entered. *Allen* v. *Claunch*, 788.

See Abatement, 4.

See Attachment, 1.

See Bank, 7.

See Depositions, 4.

See Detinue, 1, 4.

See Error, Writ of, 8, 9, 11, 12.

See Evidence, 57.

See Partners and Partnership, 2.

See Pleadings, 10.

See Process, Service of, 5.

PRINCIPAL AND AGENT.

1. D. & K. appointed H. D. their attorney, "with full power and authority for us, and in our name, to draw or indorse promissory notes, to accept, draw or indorse bills of exchange, and to sign any check, or checks, order or orders, for any money or effects, which we now have, or hereafter may have, deposited in the Branch of the Bank," &c.: *Held*,—that H. D. had an authority to make, draw, or indorse, notes or bills, on account of D. & K., without reference to the form and amount, or place where, and to whom payable. As to checks and orders there is a limitation—these must be addressed to the Branch of the Bank, &c., *Knapp* v. *McBride and Norman*, 19.

2. An agreement between A. and B. that the former should become the purchaser of property, and allow it to remain with the defendant to re-sell and reimburse the plaintiff, and if, after such payment there should be an excess, the defendant should appropriate it to himself, does not make the plaintiff the defendant's agent. *Haynes* v. *Crutchfield*, 189.

PRINCIPAL AND AGENT—(CONTINUED.)

3. Where an agent to whom a note as such agent is made payable, entrusts it to an attorney for collection, who fraudulently transfers the note to a Bank, which collects the money, the agent cannot maintain an action for money had and received to his use against the Bank. The law will not raise an implied promise except in favor of the owner of the money. *Branch Bank at Montgomery* v. *Snyder*, 308.
4. General reputation is inadmissable to prove the fact of agency. *Blevins* v *Pope & Son*, 371.
5. A principal may ratify the unauthorized act of his agent, and such ratification may be either express or implied; but to be binding on the principal must be deliberately made, with full knowledge of the material facts. *Ib.*
6. A demand of the agent, by the principal, of money, which the former had wasted, or misapplied, is not a ratification of his tortious act. *Ib.*
7. S., a practising physician, being about to leave home temporarily, made R. his agent, by verbal appointment, with a general authority to transact all business for him in this State, and left with him his books and accounts for professional services, "*for settlement:*" *Held*, that as it respected the books and accounts, the authority of the agent was restricted by the terms "for settlement;" and he was not authorized to assign them to a surety of his principal, to indemnify the surety against the consequences of his suretyship. *Wood* v. *McCain*, 800.
8. Where a principal, with a knowledge of all the circumstances of the case, deliberately ratifies the acts, doings, or omissions, of his agent, he will (in general,) be bound thereby, as fully to all intents and purposes, as if he had originally given him direct and ample authority in the premises. But where a third person acquires rights after the act is done, and before it has received the sanction of the principal, the ratification cannot operate retrospectively, so as to overreach or defeat those rights. *Ib.*
9. Where one acting as an agent of a third person, goes beyond his authority in making an assignment of debts due his principal, and a creditor of the principal causes a garnishment to be served upon his debtor, the subsequent ratification of the assignment by the principal cannot overreach and defeat the lien of the garnishee. *Ib.*

See Evidence, 50, 52.

See Justice of the Peace, 4.

PRINCIPAL AND SURETY.

1. When a judgment is obtained against a principal and his sureties, and the property of the principal is levied on for its discharge, a third person who become bound in a delivery bond for the forthcoming of the property, and it not being delivered, has the debt to pay, cannot look to the sureties for contribution. *Dunlap* v. *Foster*, 734.
2. One person entered into a contract with another, by which he was to receive his promissory note without surety, and the note was made and received; afterwards the payee called upon the maker for a surety, who accordingly took the note, had it subscribed by a third person, and returned it to the payee: *Held*, that as there was no new consideration as between the payee and principal, and none whatever, as it respects the former and the surety, the undertaking of the latter could not be enforced. *Jackson's Adm'r* v. *Jackson and another*, 791.

PRINCIPAL AND SURETY—(CONTINUED.)

3. To show that a promissory note was signed by a surety without consideration, it is competent to prove by parol the agreement between the payee and the principal, its making and acceptance by the payee, and the circumstances under which the surety subscribed it. *Ib.*

4. A surety, when sued alone, may, by releasing his principal, make him a competent witness for himself; and where a bill of exceptions states that the principal received a release from the defendant (his surety,) discharging him from all liability in respect to the subject matter of the action, it will be intended that the release was unobjectionable in its terms. *Bondurant, et al.* v. *The Bank of the State of Alabama*, 830.

See Bills of Exchange and Promissory Notes, 17.
See Evidence, 48, 51.
See Executors and Administrators, 2.
See Pleading, 20.
See Sheriff and Sureties, 2.

PROCESS AND SERVICE OF.

1. A Court may at the same term at which it renders a judgment, set it aside, and retrace its steps, and a writ of error will not lie to review its action in recalling its judgment. *Johnson* v. *Lattimore*, 200.

2. After judgment by default, where the process is a judicial attachment, a return of "not in time to execute," to the *Ca. Ad. Res.* will be considered as a general return of not found. *Quere?* Whether in any case where the process is by attachment, advantage of defects in the process are available, where no plea in abatement has been interposed? *Thompson, et al.* v. *Hair*, 313.

3. Courts will, *ex officio*, take notice of the returns made by Bank agents, in the same manner as they do returns by sheriffs. *Crawford, et al.* v. *Branch Bank at Mobile*, 383.

4. A writ was placed in the hands of a sheriff appointed by the Governor to fill a vacancy, on the 8th March, on the 12th of the same month the writ was executed on one of the defendants, and on the 30th on the other; on the 18th of March a sheriff elected by the people was invested with the office: *Held*, that the service of the writ was good, being made by a sheriff *de facto*, such a short time after his successor was qualified, that it could not have been generally known that he was superseded. *Flournoy* v. *Clements and another*, 535.

5. The writ was returned executed on C. only, who pleaded, as to G. there was no return; the declaration was against both G. and C., and both their names were stated as defendants on the margin of the judgment entry, which recited that the parties came by their attorneys, and thereupon came a jury, &c., "*to try the issue joined*," who find for the plaintiff, the amount of debt declared for, with damages: Thereupon it is considered, "that the plaintiff recover of the defendants the aforesaid debt," &c.: *Held*, that they only were parties who had united in the issue tried; that the judgment was a consequence of the verdict and intended to conform to it; and that the substitution of the word "*defendants*" for *defendant*, would be treated as a mere clerical misprision. *Graham & Christian* v. *Roberds*. 719.

PUBLIC POLICY.

1. The mere attempt of the purchaser of property at public sale to prevent a person from bidding for it, will not render the purchase invalid as against public policy; but, to have this effect the attempt must have been successful. *Haynes* v. *Crutchfield*, 189.

RENT.

1. Whether rent can in any case be recovered, where the relation of landlord and tenant has not in fact existed, but the land has been occupied by the mere sufferance of the owner.—*Quere?* *Gurley* v. *Davis, et al.* 315.

See Guardian and Ward, 1.

RIGHT OF PROPERTY, TRIAL OF.

1. The only proper issue upon the trial of the right of property under the statute, is an affirmation on the part of the plaintiff, that the property in question is subject to his execution, and a denial of that fact by the defendant; consequently a plea which alledges that the same property has been levied on at the suit of another execution creditor, a claim interposed and bond given with surety to try the right, will not be entertained, even if the proof of such facts would avail before the jury. *Langdon & Co.* v. *Brumby, Adm'r*, 53.

2. Although goods are levied on by a junior execution, and delivered to a third person, who has interposed a claim and given bond with surety as required by law, yet it will be competent to levy on the same by a *fieri facias*, the lien of which first commenced and still continues. But if the older execution is first levied and proceedings instituted to try a claim, a junior execution cannot be levied on the same property. *Ib.*

3. Where a levy is made on slaves and bond given to try the right by one claiming them, a subsequent junior execution cannot be levied on the same slaves, although they are left by the claimant with the defendant in execution. *Kemp & Buckey* v. *Porter*, 138.

See Chancery, 22, 32.

SALE.

1. If the trustee or one of the creditors, in a deed for the benefit of creditors, be authorized to prescribe the day of sale, and the length of time for which it shall be advertised, the failure to notify any of the creditors of the time and place, does not warrant the inference that as to one of the creditors provided for, and who attended the sale and purchased the property, that the sale was fraudulent: and the grantor who assented to and was present at the sale, cannot upon that ground defeat an action by the purchaser for the recovery of the articles sold. *Haynes* v. *Crutchfield*, 189.

2. The mere attempt of the purchaser of property at public sale to prevent a person from bidding for it, will not render the purchase invalid as against public policy; but to have this effect the attempt must have been successful. *Ib.*

3. A sale made of land by a devisee in trust, is not vacated, by the estate of the testator being afterwards declared insolvent, though the administrator might be entitled to the proceeds, for the purpose of distribution among the creditors. *Heirs and Adm'r of Hitchcock* v. *The U. S. Bank of Penn.* 387.

SALE—(CONTINUED.)

4. Notice given at the time of a sheriff's sale of an unextinguished equity, is sufficient to charge a purchaser, and in this respect there is no distinction between sheriff's and other sales. *Williamson* v. *Branch Bank at Mobile*, 907.

See Trust and Trustee, 3.

See Contract, 3, 4.

SET OFF.

1. *Semble*—Where a promissory note is made negotiable and payable at Bank, the right of set off or other kindred defence is waived, not only against the Bank, but against any one who may advance upon it, without notice of the unfairness of its origin. *Knapp* v. *McBride & Norman*, 20.

2. In an action for the recovery of money due on a promissory note, the defendant cannot under the plea of set off, give in evidence a writing by which the plaintiff promised to pay to him "fifty barrels of corn;" because the value of the corn is not ascertained, either by the contract of the parties, or the law. *Handley* v. *Dobson's Adm'r*, 359.

3. A set off due to the maker of a note, by one who has become beneficially interested in it, without the legal title by indorsement, cannot be enforced, so as to defeat the right of a subsequent indorsee to recover on the note. *Pitts* v. *Shortridge's Admr's*, 494.

4. Under an agreement by the payee that any note the maker will obtain on him, shall be a good set off, a note against the payee, though not indorsed, will be a good set off against the note when sued on, for the use of another; the set off being obtained before notice that the beneficial plaintiff had acquired an interest in it. *Gary, use, &c.* v, *James*, 640.

5. A plea of set off, to a suit brought by an administrator, is not answered by a replication that the estate has been declared insolvent. If in such a case a balance is found in favor of the defendant, judgment will not be entered against the administrators, but the amount will be certified to the Orphans' Court as a claim against the estate. *Godbolt & Andress, Adm'rs* v. *Roberts, Adm'r*, 662.

6. P. and W. are the joint makers of a note to one J. W., who assigns it to M., but previous to any notice to the payers of the assignment, P., one of them, acquired a note made by J. W. payable to one J. P., and by him assigned to P.; *Held*, in a suit on the note by M. against W., that the latter was entitled to the benefit of the set-off held by his co-maker P. against J. W., on producing the note at the trial, with the consent of P. to use it as a set off. *Winston* v. *Metcalf*, 837.

SHERIFF AND HIS SUCCESSOR.

1. A sheriff who has begun to do execution, should proceed therein, and having levied it, the common law requires that he should sell the goods, even after the return day, although he may have been superseded by his successor; and he is not excused for a non-performance of his duty by delivering the execution and goods to his successor, but he must sell them, or otherwise legally dispose of them. If by statute, a *venditioni exponas* is made necessary to sell the goods after the return day of the *fi. fa.*, he should at least accept it, when it is tendered him by the plaintiff. *J. W. & R. Leavitt* v. *Smith, et al*, 175.

SHERIFF AND SURETIES.

1. The question, whether the defendant is, or is not sheriff, is involved in an issue, upon a motion against one as sheriff, for failing to make the money upon an execution. *Hopkins* v. *Gary, et al.* 46.

2. Where a sheriff collects money on a *fieri facias*, and renews his bond before it was demanded of him, or he converts the same, the sureties in the latter bond may be charged with his default in failing to pay over the money, if the evidence shows its conversion after their bond is received, and before they were discharged from the suretyship. *The Governor, use, &c.* v. *Robbins, et al.* 79.

3. Where the plaintiff excuses the sheriff from his duty to return an execution, he cannot afterwards maintain a motion under the statute for the omission. *Gary* v. *Boykin*, 154.

4. Where the principal sum of an execution has been accepted by the plaintiff from the sheriff, neither the plaintiff nor any officer of Court in his name, can maintain a motion, under the statute, against the sheriff and his sureties, for the costs. *Ib.*

5. It is competent for a sheriff when charged with neglect in failing to make the money on an execution, to prove that goods levied on by him under the impression that they belonged to the defendant, and afterwards released, were not the defendant's property; and consequently not liable to the satisfaction of the execution. *J. W. & R. Leavitt* v. *Smith, et al.* 176.

6. The settlement of an account by the defendant in execution with the sheriff, for money due from him, is no discharge of the execution, although the sheriff receipts for the amount of the account as money. *Williams* v. *Charles*, 202.

7. To justify a sheriff in discharging a levy already made, or in refusing to levy because the plaintiff in execution did not at his requisition execute a bond of indemnity, he must show that a doubt exists of the title of the defendant in execution to the property, by proving, either that the title to the property is in another, or that some third person asserts a title to it. *Ogden, Wadlington & Co.* v. *Powell*, 243.

8. In a motion by the clerk of the Supreme Court against the sheriff and his sureties for failing to pay over moneys collected upon an execution for costs, issued from the Supreme Court, it is necessary that the notice of the motion should show, that a demand of the money was made of the sheriff, or of the surety sought to be charged. *Wallace* v. *Taylor, et al.* 668.

9. When an execution against two is placed in a sheriff's hands for collection he cannot discharge himself from a rule, suggesting that he could by due diligence have made the money, by showing that the plaintiff had previously released one of them. *Mason, et al.* v. *Watts*, 703.

10. The sheriff can excuse himself from such a rule by showing that the defendants had no property out of which the money could be made; and this after levy, if he has returned the property to the true owner. *Ib.*

11. The omission to return a claim bond and affidavit does not *per se*, make the sheriff liable for the value of the property levied on. Even when he takes a defective bond he may discharge himself, by showing, that the defendants were not the owners of the property levied on, and that it has been returned to the true owner. *Ib.*

SHERIFF AND SURETIES—(CONTINUED.)

See Amendment, 5.
See Attorney at Law, 4.
See Elections by the People, 2.
See Executions, Writ of, 11.
See Pleadings, 14.
See Process of Service of, 4.

SLANDER.

1. In an action of slander the character of the plaintiff is not in issue before the jury, unless it is attacked by plea of justification, or by evidence at the trial; evidence therefore of his good character is inadmissible in the first instance, and before evidence to impeach it has been offered by the defendant. *Rhodes* v. *Ijames*, 574.

2. A witness in an action of slander, is not permitted to make out the plaintiff's case by proving words merely equivalent in his estimation, to those he heard the defendant use; but he must state the language that was employed by the defendant according to the best of his recollection, that it may appear that the cause of action alledged, is supported by the proof. *Teague* v. *Williams*, 844.

3. It is competent for the defendant to prove slanderous words, such as are charged in the declaration, having been uttered by the defendant since the commencement of the action, for the purpose only, of showing *quo animo* the words charged were spoken. *Ib.*

See Evidence, 56.
See Pleadings, 22, 23.

SLAVES.

1. Where a title to slaves is dependant upon the default of the grantor in not paying a specified debt, if there is a default, the extent of it is an immaterial inquiry. *Bell* v. *Pharr, et al.* 807.

See Legacy, 2.

STATUTES.

1. An act of the Legislature authorizing a married woman to act and dispose of all property subsequently acquired by her, by her own exertions, or from other persons, as a *feme sole*, with a saving as to existing creditors, will not have a retrospective effect, so as to deprive the husband or his creditors of the benefit of any property which previously belonged to the wife. *Carleton & Co.* v. *Banks*, 32.

2. Previous to marriage, a deed was executed conveying to a trustee a slave, and securing to the female a life interest therein, with remainder to others. The trustee delivered the slave to the female, who either before or after such delivery married. *Held*—that the life estate was subject to sale, under execution, by the creditors of the husband, notwithstanding the act previously cited; and that it was unimportant whether the possession was delivered before or after the passage of this act. *Ib.*

STATUTES—(CONTINUED.)

3. Where a contract in writing professes to be sealed by the obligors, although they have omitted to affix their seals, yet by the act of 1839, it will be held to be a sealed instrument. *Bancroft, Adm'r*, v. *Stanton*, 351.

See Bank, 10.
See Error, Writ of, 19.
See Executions, Writ of, 19.
See Gaming, 1, 2.
See Indorser and Indorsee, 5.
See Jurisdiction, 13.
See Orphans' Court, 14.
See Pleading, 14.

SUMMARY PROCEEDINGS.

See Chancery, 18.
See Execution, Writ of, 12.

SUPERSEDEAS.

1. An execution may be arrested by *supersedeas*, if an unjust or improper use is attempted to be made of it, and this although the objection does not appear of record, but is shown by oral testimony. *Rutland's Adm'r* v. *Pippin and another*, 469.

TROVER AND CONVERSION.

1. It is in the discretion of the primary Court to permit, or refuse, a leading question to be put by a party to his own witness, and cannot be revised on error. *Blevins* v. *Pope and Son*, 371.
2. A demand of the agent, by the principal, of money, which the former had wasted, or misapplied, is not a ratification of his tortious act. *Ib.*

TRESPASS.

1. A warrant issued by a justice of the peace, and affidavit on which it was founded, alledging that the defendant therein "has property in his hands in a fraudulent condition," does not charge an offence known to the law; and the officer who executed, as well as the person who caused it to be issued, are liable in a trespass to the party arrested. *Buckworth* v. *Johnson*, 578.
2. A bailee of hogs running at large in the range, may maintain an action of trespass for an injury to the hogs, as by injuring them with dogs, and splitting their hoofs, though none be killed. *Hare* v. *Fuller*, 717.

TRUST AND TRUSTEE.

1. *Quere?*—Whether a statement by the testator, proved in a nuncupative will, that he wanted one sum of money appropriated to the schooling of three of his children, and another sum to the like purpose of two other children, is not to be considered as the creation of a trust, and not as a legacy. *Quere*—Also, whether these trusts or bequests do not lapse in the event of the death of the *cestui que trust*. *Boyett, et al.* v. *Kerr*, 9.

TRUST AND TRUSTEE—(CONTINUED.)

2. Where detinue is brought for the recovery of several articles, it is not necessary that the value of each should be separately stated in the declaration, but *generally* the jury should sever the value of each by their verdict. *Haynes v. Crutchfield*, 189.

3. Where the sale of property which had been conveyed by deed of trust, was, under the powers conferred, expedited, (with the assent of the grantor,) so as to prevent the interference of some of his creditors, who were prosecuting their claims to judgment; the grantor when sued by the purchaser at the trust sale for property sold, cannot for that cause defeat a recovery. *Ib.*

4. Any execution creditor, independent of the statute right of payment, may compel creditors secured by mortgage or deed of trust, to close the trust by sale, and distribute the surplus, if any will be the probable result of a sale; and, without such probability, upon indemnifying the other party against the costs of suit and sale. *Dubose* v. *Dubose*, 235.

5. Where one procures bills to be drawn for his accommodation, and afterwards executes a deed of trust as a security to the acceptors, to secure promissory notes which are given as well for the amount of the accepted bills, as for an amount due the acceptors, on account stated; the holders of the bills may resort to the trust property for the payment of them when dishonored, if the promissory notes have not been negotiated to *bona fide* purchasers, for a valuable consideration. *Toulmin, et al.* v. *Hamilton. et al.* 362.

6. *Quere?*—Whether the trust fund is first to be applied to discharge the sum due the acceptors of the bill upon the account stated, or divided *pro rata*, to that and the several bills. *Ib.*

7. Where a devisee in trust to sell and dispose of the real estate of the testator, upon the consideration of the payment by a mortgagee of the testator, of a sum of money, by deed, "acknowledged, remised, and forever quit claimed, all the estate, right, title, interest, use, trust, property, claim, and demand whatsoever, at law, as well as in equity, in possession as well as in expectancy, all and singular, &c." describing the mortgaged property, which conveyance was made to the mortgagee: *Held*, that this was a conveyance of the equity of redemption, being made after the mortgage was forfeited. *Heirs and Adm'r of Hitchcock* v. *The U. S. Bank of Pa.* 387.

8. A sale made of land by a devisee in trust, is not vacated, by the estate of the testator being afterwards declared insolvent, though the administrator might be entitled to the proceeds, for the purpose of distribution among the creditors. *Ib.*

9. It is no objection that a trustee and his *cestui que trust* unite in the same bill: therefore, where trustees filed a bill without disclosing the beneficiary, and afterwards a supplemental bill, disclosing the fact that they were trustees for the United States Bank of Pennsylvania, and praying that it be made a party complainant to the bill; and also an amended supplemental bill, disclosing that the Bank had gone into liquidation, and that certain persons were assignees of the Bank, and praying also that they may be made parties complainant: *Held*, that all these persons constitute in law but one, representing the interest of the Bank. *Ib.* 388.

10. A declaration by the sheriff that he levied an execution in favor of the plaintiff, on certain slaves who were present, in the possession of a trustee, for the purpose of being sold under a deed of trust; without attempting to take them into his

TRUST AND TRUSTEE—(CONTINUED.)

possession, or otherwise control them, does not amount to such a divestiture of the authority of the trustee to sell the slaves, as will affect the title acquired by a purchaser under him. *Cobb* v. *Cage*, 619.

11. A creditor, or legatee, has the right to pursue the assets of an estate, whenever there is reason to apprehend their misapplication by the executor, either voluntarily, or by coercion of execution, in satisfaction of his own debts. *Williamson* v. *The Branch Bank at Mobile*, 906.

See Fraud, 1, 3.

See Will, and Probate of, 3.

USE AND OCCUPATION.

1. A person entered into a verbal contract for the purchase of a tract of land in fee, and in virtue thereof took possession and cultivated the same for two years, then abandoned the possession and renounced the contract—the vendor at the same time offering to make a deed for the land, which the vendee declined to accept: *Held*, that an action of *assumpsit*, for use and occupation will lie at the suit of the vendor, to recover of the vendee for the two years permissive occupancy. *Davidson* v. *Ernest*, 817.

USURY.

1. Where the defendant offers himself as a witness to support the plea of usury under the act of 1819, and the plaintiff states on oath that the note declared on, is not tainted with usury, sets out what was its true consideration, and thus negatives what the defendant had deposed, the testimony of both should be rejected *in toto;* consequently it is error to instruct the jury, that so far as the defendant was uncontradicted, his evidence was properly before them, and that they should consider that part of his evidence that was contradicted, if corroborated by other proof. *Logan* v. *Hodges' Adm'r*, 66.

2. The proviso to the act of 1818, restraining Banks in their loans and discounts to six *per cent. per annum* is obsolete. *Heirs and Adm'r of Hitchcock* v. *The U. S. Bank of Pa.* 387.

See Conflict of Laws, 2.

VARIANCE.

1. A forthcoming bond must describe the execution which is thereby superseded with sufficient certainty to enable the Court to determine what execution it was intended to supersede, but a small and unimportant variance will be disregarded. *Anderson* v. *Rhea*, 104.

2. A variance between the property described in the bond as having been levied on, and the indorsement of the levy on the execution, cannot be taken advantage of by the defendant. *Ib.*

3. A variance between the indorsement on the writ, and the declaration, cannot be pleaded in abatement; but if the plaintiff should declare upon a cause of action, entirely different from the indorsement upon the writ, the Court would on motion refuse to permit the declaration to be filed. *Sexton* v. *Rone*, 829.

VENDOR AND VENDEE.

1. Where one proceeds in a contract for the exchange of lands, so far as to obtain the possession with knowledge of a defect in the title, he cannot afterwards object to the title as a reason for not completing the contract, unless there is unreasonable delay in procuring the title, or in curing the defect. If he knows that the defect can only be obviated by a judicial proceeding, the time stipulated for the completion of the contract will not be considered an essential ingredient. In such cases, the question is not, whether the party is able to make title on the day stipulated, but whether there has been unreasonable delay in obtaining title. *Beck* v. *Simmons & Kornegay*, 71.

2. If one purchases lands to which he knows the title is defective, accepts a deed for it, and goes into possession, he cannot afterwards rescind the contract for the defect in the title. *Ib.*

3. It is competent for the vendor to prove knowledge in the vendee of a defect in the title when the contract was made, as an excuse for not making the title at the time stipulated. Such proof does not vary the contract of the parties, though it may excuse its literal performance. *Ib.*

4. Where there is a valid contract in writing, if the purchaser of land is in possession, he cannot resist the payment of purchase money by showing that the vendor had no title; but if the vendor's contract is void by the statute of frauds, the vendee may avoid the payment of the money agreed to be paid, although he has given his promissory note for the amount. *Bates* v. *Terrell*, 129.

5. Where one purchases land at a sale made by order of the Orphans' Court, and goes into possession, and remains in possession for two years, exercising ownership over it by cultivation, and clearing the timbered land, &c.,—he cannot rescind the contract, although the Orphans' Court had no jurisdiction to direct the sale, unless the heirs are unable or unwilling to make a good title to the land. *Lamkin, et als.* v *Reese, et als.* 170.

6. Where a mistake has been made in the decree of the Orphans' Court, as to the description of the land intended to be sold, which mistake is continued in the advertisement of the commissioners, the contract cannot be rescinded for that cause, if the purchaser was not deceived thereby, but got the land he intended to purchase, and the Court and the commissioners intended to sell. Nor will a bill in Chancery be entertained to correct the mistake, unless upon application to those having the power to rectify it, they refuse to do so. *Ib.* 171.

7. A purchaser who buys land previously purchased by another, pays the purchase money, and obtains his title, before he receives notice of such prior purchase, will be protected in equity. These facts he must alledge in his plea, or answer, whether he is charged in the bill with notice, or not, and must deny notice down to the time of the payment of the purchase money, and the execution of the deed, or he will be held a purchaser with notice of a previous sale. *Moore, et als. v. Clay*, 742.

8. Where, upon the sale of property, the vendor receives a note with an indorsement for a greater amount than the purchase money, and gives his own note to the vendee for the payment of the excess at a day certain, the vendor when sued upon his note, may show in defence to the action, that the maker of the indorsed note was insolvent, so that a suit against him would have been unavailing; and this although no action was brought. The insolvency of the maker may be shown by parol evidence—the statute requiring suit to be brought to the first

VENDOR AND VENDEE—(CONTINUED.)

term, &c., only applies when an action is brought by the indorsee against the indorser upon his indorsement. *Litchfield v. Allen & Falconer*, 779.

9. One who buys land, at a sale by order of the Orphans' Court, executes his notes for the purchase money, and is let into possession, cannot defend himself at law, when sued upon the notes, upon the ground that the title was not divested out of the heirs at law, and vested in him, by the decree of the Orphans' Court. *Worthington, Adm'r*, v. *McRoberts and Porter*, 814.

10. Where lands are sold *by the quarter section, according to the survey under the authority of the Federal Government, at so much an acre*, and bonds are given for the payment of the purchase money, the purchaser cannot claim a deduction for a deficiency in the quantity of the land—there being no fraudulent concealment or misrepresentation, by the vendor, or any one representing him, or authorized to act in the matter. *Perkins' Ex'r v. Winter's Adm'rx*, 855.

11. Where lands are sold by commissioners, under an order of the Orphans' Court, the sale confirmed, the commissioners *ordered* to make a "conveyance by deed" to the purchaser, and bonds for the payment of the purchase money executed by the latter, the rule of *caveat emptor* applies, and the purchaser can claim no indemnity, for any incumbrance that may rest on the title. *Ib.*

See Chancery, 25, 26, 28.

See Consideration, 1.

See Orphans' Court, 4.

See Fraud, 9.

WILLS AND PROBATE OF.

1. The proper course of practice in the County Court in testamentary causes is, for the person producing the will and asking probate to propound the will, to the Court in writing, with the usual facts necessary to be proved, and informing the Court what persons will be entitled to distribution if the will is invalid. *Boyett, et al.* v. *Kerr*, 9.

2. A testator declared that he lent a negro girl to each of his four daughters *nominatim*, during their respective lives, at their death to go to their children lawfully begotten of their bodies; "and if any children decease leaving no heirs lawfully begotten of their bodies, their part must be equally divided among the rest of my children, and their children lawfully begotten of their bodies." After making some provision in respect to the treatment of his slaves, the testator added that "they are only lent to my children during their lives, and given to my grand children." *Held*—that the limitation over in favor of the grand children was not too remote, and the first takers did not take an absolute estate in the slaves. *Doyle* v. *Bouler*, 246.

3. H. made his will, containing the following clause: "For the purpose of having my estate properly settled, and administered, during the minority of my children, I do hereby appoint my dear wife, Anne, my sole executrix, and I do bequeath and devise the same, both real, and personal, to her, in trust, with full powers to sell, either at public, or private sale, all, or any part thereof, and the proceeds to re-invest, and re-sell, at her discretion, for the purpose of paying my debts, and legacies, or for a more advantageous investment; and good and sufficient deeds and conveyances to make therefor. It being my intention, and will, that my estate shall be kept together, and held in common, for her benefit, and that of

WILLS, AND PROBATE OF—(CONTINUED.)

my children, until they shall become of age respectively; at which time, and as soon after, as any one of them comes of age, he, or she, is to receive their proportion, it being always understood, that my wife is to receive an equal proportion of my estate, she, and they, having share, and share alike." *Held*, that this was a devise in trust to the devisee, of all the estate, real, and personal, in her individual character, and not as executrix: and that her refusal to qualify as such, did not affect the trust. *Heirs and Adm'r of Hitchcock* v. *The U. S. Bank of Penn.*, 387.

4. The office of the codicil, is to explain, add to, or subtract from the will; the will, and codicils, if there are more than one, constitute but one instrument. *Ib.*
5. A will of personal property will be established, though not written or signed by the testator, or attested by witnesses, if made according to the directions of the deceased, and approved, and not signed from physical debility, or the near approach of death. *Couch, et al.* v. *Couch*, 519.
6. It is strong evidence of capacity to make a will, that its provisions are suitable, and made in accordance to previous expressed determinations. *Ib.*

See Legacy and Distributive Share, 1.

See Legacy, 2.

See Trust and Trustee, 1.

WITNESS.

1. A witness cannot excuse himself, or be excused from giving evidence, although his answer may expose him to a civil action. *Alexander, et al. Admr's.* v. *Knox & Co.* 503.
2. When an application is collateral to the main question, where it is merely auxiliary to the suit, addressing itself to the Court and not to the jury, having no tendency either to prove, or disprove, the matter in controversy, but relating to the preparation of the suit for trial, the parties to the record are competent witnesses. *Ex parte, Simpson*, 842.
3. The sureties to a bond for an attachment, may prove that an affidavit was made, and is lost, so that another may be substituted. *Ib.*

See Depositions, 13.

See Evidence, 53.

See Principal and Surety, 4.

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